Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ___

IN THE

Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

v.

CITY OF CHESTER,
COUNTY OF DELAWARE, AND
CONSOLIDATED RAIL CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Pennsylvania Commonwealth Court is correct in rejecting the determinations of the courts of the Third Circuit that the exemption provided in Amtrak's enabling statute, 49 U.S.C. § 24301(l), which is based on the interstate commerce clause, exempts Amtrak and SEPTA from allocations assigned by the PUC pursuant to its statutory mandate to oversee the alteration, relocation, suspension or abolition of highway bridges over railroad rights-of-way in a manner which promotes public safety and prevents accidents?

LIST OF PARTIES

The parties to the Pennsylvania Commonwealth Court action are the City of Chester, the County of Delaware, the Consolidated Rail Corporation (the caption below has been changed to reflect the change from Consolidated Rail Corporation to Norfolk Southern Railway Corporation), and the Pennsylvania Department of Transportation. In addition, the National Railroad Passenger Corporation and the Southeastern Pennsylvania Transportation Authority have been served with a copy of this Petition.

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Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

PETITION FOR A WRIT OF CERTIORARI

The Petitioner Pennsylvania Public Utility Commission respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Pennsylvania Supreme Court entered in the above-entitled proceeding on October 5, 2001.

OPINIONS BELOW

The order of the Pennsylvania Supreme Court denying the petition for allowance of appeal from the opinion of the Commonwealth Court of Pennsylvania are reprinted in the appendix hereto (App. A, p. 1a).

The opinion of the Commonwealth Court of Pennsylvania is reported at 773 A.2d 1280 (2001). It is reprinted in the appendix hereto (App. B, p. 2a).

The two opinions and orders of the Pennsylvania Public Utility Commission are reprinted in the appendix hereto (App. C, p. 15a and D, p. 39a).

JURISDICTION

On October 5, 2001, the Supreme Court of Pennsylvania denied the petition for allowance of appeal filed by the Pennsylvania Public Utility Commission, leaving intact the April 7, 2001 decision of the Commonwealth Court of Pennsylvania. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

STATUTES INVOLVED

The relevant provisions of 49 U.S.C. § 24301(*l*), 66 Pa. C.S. §§ 2702, and 2704 are reprinted at Appendix F, p. 69a).

STATEMENT OF THE CASE

The federal courts in the Third Circuit and the state courts of Pennsylvania have developed irreconcilable case law regarding the interpretation of a federal statute that exempts the National Railroad Passenger Corporation (Amtrak) and the Southeastern Pennsylvania Transportation Authority (SEPTA) from certain local taxation. In particular, the federal courts have ruled that this federal tax exemption statute exempts Amtrak and SEPTA from any state law obligation to pay a share of the costs associated with the repair and maintenance of rail-highway crossings in Pennsylvania. However, the Pennsylvania Commonwealth Court has ruled, unequivocally, that the language of the federal tax exemption statute does *not* apply to such allocated repair and maintenance costs.

In order to assure public safety at rail-highway crossings, the Pennsylvania Public Utility Commission (hereinafter "PUC" or "Commission") is obligated, under state law, to allocate, among affected parties, the legitimate costs incurred

to repair and maintain rail-highway crossings. However, the effect of this legal impasse between the federal and state courts is that the PUC is unable to carry out its uncontested duty to assure public safety at rail-highway crossings in Pennsylvania.

At this juncture, the Pennsylvania Supreme Court has let stand a Commonwealth Court order directing the PUC, for the third time, to issue an order directing that Amtrak and SEPTA be allocated their appropriate share of the rail-highway crossing repair and maintenance costs. In effect, the Commonwealth Court order directs the PUC to disregard the federal courts' interpretation of the federal tax exemption statute which directs the PUC to not allocate any share of these costs to Amtrak and SEPTA. Only review by the Honorable Court can resolve this irreconcilable conflict between the federal and state court systems on this issue.

Federal Tax Exemption Statute

The statute, which exempts Amtrak and SEPTA from a "tax, fee, head charge, or other charge, imposed or levied by a State, [or] political subdivision," 49 U.S.C. § 23401(l), has been interpreted by the courts of the Third Circuit to exempt Amtrak from Commission allocations of costs and responsibilities for work and maintenance performed on highway bridges over railroad rights-of-way to ensure the safety of the crossing areas. 66 Pa. C.S. §§ 2702, Appendix F.

The Commonwealth Court rejected the federal courts' application of the tax exemption statute and, in the order under review, directed the Commission to not apply the exemption. 773 A.2d 1280, 1285.

Although the Commonwealth Court has retained jurisdiction in the matter, both Amtrak and SEPTA have filed for injunctive relief in the United States District Court for the Eastern District of Pennsylvania, seeking to order the PUC to act in contrary to a direct state court order. This conflict,

which is long-standing and cannot be resolved without the aid of this Court, is preventing the PUC from carrying out its own statutory mandate to prevent accidents and promote safety at rail-highway crossings in Pennsylvania.

The PUC is an independent administrative agency of the Commonwealth of Pennsylvania which operates in a quasi-judicial capacity and is charged with, among other things, the "prevention of accidents and the promotion of safety of the public" where railroad rights-of-way meet public highways within the boundaries of the Commonwealth. 66 Pa. C.S. § 2602(b). No construction, relocation, alteration, protection, suspension or abolition of a rail-highway crossing may occur without an order from the Commission, which may order necessary work to be performed and paid for by any public utility or municipal corporation concerned or by the Commonwealth. 66 Pa. C.S. §§ 2702(c), 2704(a).

State Administation Proceeding

The present case began with a PUC Order entered May 29, 1997 at PUC Docket No. M-00970921, which affirmed the action of the City of Chester in posting the Lloyd Street Bridge for a five (5) ton weight limit. A field conference held by Commission Staff revealed that no concerned party agreed to accept responsibility for maintaining the structure. Accordingly, by Order entered October 6, 1997, the Commission instituted an investigation to determine the condition, disposition, and responsibility for maintenance of the existing crossing structure carrying Lloyd Street above the grade of the track of the National Railroad Passenger Corporation (hereinafter "Amtrak") in the City of Chester, Delaware County, Pennsylvania. The October 6, 1997 Order also directed that the Pennsylvania Department of Transportation (PennDOT), the City of Chester (Chester), Delaware County (County), Amtrak, Southeastern Pennsylvania Transportation

Authority (SEPTA), Philadelphia Electric Company (PECO), Bell Atlantic-PA (Bell), Philadelphia Gas Works (PGW) and AT&T Communications be made parties to the proceeding.

Following a series of evidentiary hearings, briefs were filed by Commission Staff, Conrail, PennDOT, the City, and Amtrak. Reply Briefs were filed by Commission Staff, PennDOT, and Amtrak. The ALJ's Recommended Decision was issued on March 14, 2000, and Exceptions were filed by Amtrak, the City, PennDOT, Conrail, the County, and Reply Exceptions were filed by the City, Conrail, PennDOT, Commission Staff and the County. The issue before this Court, whether the Amtrak/SEPTA exemption prohibits the PUC from allocating costs and responsibilities in rail-highway crossing cases involving highway bridges over railroads, was properly raised, briefed and decided before the Commission.

Commission's September 1, 2000 Order

On September 1, 2000, the Commission issued its Opinion and Order in this matter, which denied all Exceptions and adopted the Recommended Decision of the ALJ. The Commission's Order of September 1, 2000, stated that Amtrak and SEPTA were exempted from the allocation of costs and responsibilities because of their federal exemption, in keeping with a line of federal case law. *National Railroad Passenger Corporation v. Pa. Publ. Util. Comm'n and Township of Tredyffrin,* 665 F.Supp. 402 (E.D. Pa. 1987), *aff'd.*, 848 F.2d 436 (3rd Cir. 1988), *cert. denied,* 109 S.Ct. 231 (1988) ("Therefore, we hold that Amtrak's immunity from local "taxes or other fees" in section 546b extends to assessments for local improvements of the kind at issue here." 848 F.2d at 440; *Southeastern Pennsylvania Transportation Auth. v. Pa. Pub. Util. Comm'n*, 826 F.Supp. 1506 (E.D. Pa. 1993), *aff'd w/o opinion*, 27 F.3d 558 (3rd Cir. 1994), *cert. denied*, 114 S.Ct. 318 (1994) (". . . there is no basis for concluding that SEPTA is entitled to a lesser immunity from

similar assessments [than Amtrak] in these cases, the PUC will be enjoined from allocating such costs against SEPTA . . ." 826 F.Supp. at 1526); *Southeastern Pennsylvania Transportation Auth. v. Pa. Publ. Util. Comm'n*, Civil Action No. 95-4500 (orders entered January 19, 1996 and August 23, 1999), 1999 U.S. Dist. LEXIS 12882. *See* Commission Order of September 1, 2000, Appendix D, page 39a.

Pennsylvania Commonwealth Court Decision

The Order was appealed to the Pennsylvania Commonwealth Court by the City of Chester, the County, and Conrail.[1] The three appeals were consolidated by Order dated November 16, 2000, and the Commonwealth Court was asked to review the question before this Honorable Court: whether the Commission's allocation of costs and responsibilities in rail-highway crossing cases where a highway bridge crossed the railroad, is prohibited by 29 U.S.C. § 24301(l), Appendix F, p. 69a.

The case was briefed by the City of Chester, Conrail, the County of Delaware, PennDOT and the PUC. Following oral argument, the Commonwealth Court of Pennsylvania issued an order on April 7, 2001, which vacated the order and remanded the matter to the PUC to hold an additional hearing and issue an adjudication to apportion costs for the repair and maintenance of the Bridge between the present parties, Amtrak and SEPTA within 120 days of the order. Although the Commonwealth Court retained jurisdiction, the Commission sought review by the Pennsylvania Supreme Court since the Commonwealth Court order directed the

[1] Although Amtrak and SEPTA were parties to the Commission case, they were not aggrieved by the order and did not appeal. Despite the fact that the question under appeal would be their federal tax exemption, neither party intervened before the Commonwealth Court.

Commission to violate a Consent Decree that the Commission had entered into with SEPTA in 1996, as well as the federal courts' interpretation of the Amtrak/SEPTA exemption.

On October 5, 2001, the Pennsylvania Supreme Court denied review without an opinion. Appendix A.

The Commonwealth Court opinion followed a line of Pennsylvania state court cases which holds that the federal exemption granted to both Amtrak and SEPTA is *not* applicable to allocations by the Commission in rail-highway crossing cases. *Southeastern Pennsylvania Transportation Auth. v. Pa. Publ. Util. Comm'n*, 592 A.2d 797 (Pa. Cmwlth. Ct. 1991), *petition for allowance of appeal* denied 531 Pa. 632, 611 A.2d 714 (1992) ("Accordingly, we find that SEPTA is not exempt under 45 U.S.C. § 581(c)(5) from the imposition of maintenance responsibilities for the substructure and superstructure of the Bridge." 592 A.2d at 804; *City of Philadelphia v. Pa. Publ. Util. Comm'n*, 676 A.2d 1298 (Pa. Cmwlth. Ct. 1996), *petition for allowance of appeal denied*, 564 Pa. 657, 684 A.2d 558 (1996), *cert. denied*, 520 U.S. 1144 (1997) ("Because the costs of repairing and maintaining the 41st Street Bridge are not a "tax" or "fee" from which Amtrak would be exempt, we vacate the PUC order and remand for it to make a new allocation of costs considering all parties, including Amtrak." 676 A.2d at 1309).

On September 1, 2001, the Commission issued its order on remand, wherein it complies with the Commonwealth Court directive and allocates certain costs for the maintenance of the Lloyd Street Bridge to Amtrak and SEPTA. The Commonwealth Court, under its retained jurisdiction, is reviewing the September 1, 2001, decision.[2]

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[2] Although the Commonwealth Court is reviewing the Commission's September 1, 2001 order, the issue of the Commission's ability to allocate costs to Amtrak and SEPTA has been decided finally. The law of the case

Additional Federal Court Proceedings

Amtrak, rather than seek relief from the Commonwealth Court, has filed a new complaint in the U.S. District Court for the Eastern District of Pennsylvania, basing its request for relief upon the Commission's September 1, 2001order which was itself issued pursuant to the direct order of the Commonwealth Court and which is the subject of this petition for writ of certiorari. *National Railroad Passenger Corporation v. Pa. Publ. Util. Comm'n, et al.*, C.A. No. 01-5570 (E.D. Pa.).

SEPTA has filed a petition to enforce the Consent Decree in the United States District Court for the Eastern District of Pennsylvania, also based on the Lloyd Street Bridge case, which is the subject of the present petition for writ of certiorari. *Southeastern Pennsylvania Transportation Authority v. Pa. Publ. Util. Comm'n*, C.A. No. 95-4500 (E.D. Pa.). Both cases were still pending at the time of this filing.

Since 1987, the Commission has been receiving conflicting orders from the state Commonwealth Court and the courts of the Third Circuit. The Commission's ability to issue and enforce orders aimed at preventing accidents and promoting safety at rail-highways crossing involving highway bridges in the Commonwealth is severely hampered by this continuing conflict. This Court could end this tortured line of conflicting case law by deciding one simple issue: whether the exemption from taxes and other fees provided to Amtrak in its enabling statute prohibits the PUC's allocations of costs and responsibilities in rail-highway crossing cases where a highway bridge crosses the railroad is prohibited.

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doctrine will not permit the Commonwealth Court to revisit its decision that the Commission must include the two parties in its cost allocation deliberations and that question would elude review in future decisions issued in this matter. *See City of Philadelphia v. Pa. Publ. Util. Com'n*, 720 A.2d 845 (Pa. Cmwlth. Ct. 1998), *petition for allowance of appeal denied*, 560 Pa. 869, 742 A.2d 677 (1999) for a discussion of the law of the case doctrine.

REASONS FOR GRANTING THE WRIT

I. THE PENNSYLVANIA COMMONWEALTH COURT HAS DECIDED A FEDERAL QUESTION CONTRARY TO THE HOLDINGS OF THE COURTS OF THE THIRD CIRCUIT

This case presents a question of substance not heretofore determined by the Supreme Court. The fact that the state and federal courts are entrenched in opposing viewpoints regarding the applicability of the Amtrak/SEPTA exemption severely hampers the ability of the PUC to carry out its statutory mandate to promote safety and prevent accidents at rail-highway crossings. The Commonwealth Court opinion is in direct conflict with the decisions issued by the federal courts of the Third Circuit. The Commonwealth Court has three times issued opinions which conflict with federal case law regarding whether or not the Commission can allocate costs and responsibilities in cases involving highway bridges over railroad rights-of-way to Amtrak and to SEPTA.

The Commission is prevented from assessing any costs or responsibilities to SEPTA under a Consent Decree entered in the U.S. District Court for the Eastern District of Pennsylvania, which is a final order that precedes the state action before this Court and which is entitled to deference under the doctrine of Full Faith and Credit. However, the Commission is required by Commonwealth Court order to disregard the Consent Decree and to consider SEPTA to be a party capable of bearing such costs and responsibilities.

The Commission is prohibited by federal case law developed under the Amtrak statute from allocating costs and responsibilities against Amtrak. However, recent Commonwealth Court decisions, including the opinion under review, require the Commission to include Amtrak in the pool of concerned parties to whom costs and responsibilities may be allocated. A Commission decision following one court system will be in conflict with the other. The Commission is,

however, bound to carry out its statutory mandate which requires it to assign maintenance responsibilities and resultant costs to some party in order to protect the public from a badly deteriorating highway bridge over a railroad, and must, therefore, continue to make decisions regarding rail-highway crossing safety. As explained by the Commonwealth Court:

> The allocation of costs of maintaining a highway-roadway crossing by the PUC is simply a determination of how those who benefit from the crossing will incur costs they would have had at common law and is not a tax or fee. . . .
>
> * * *
>
> . . . the allocation was intended to be a timely, fair method of ensuring the safety of the public by those responsible for the crossing. . . .
>
> * * *
>
> Without the PUC's intervention providing a reliable, orderly process, the public would have to rely on the railroad companies' voluntary fulfillment of its common law duty to maintain the bridges necessitated by their railroad tracks, with the only enforcement through the courts.

City of Philadelphia v. Pa. Publ. Util. Comm'n, 676 A.2d 1298, 1306-1308 (Pa. Cmwlth. Ct. 1996), *petition for allowance of appeal denied* 564 Pa. 657, 684 A.2d 558 (1996) *cert. denied* 520 U.S. 1144 (1997).

In addition, the Commission is facing possible injunctions and penalties from the federal court for complying with the state court order. The Commission must choose between issuing orders to ensure the safety at rail-highway crossings in the Commonwealth which violate either state or federal law, or failing to carry out its statutory mandate by issuing no orders at all. This situation will not resolve itself without a definitive review from this Honorable Court.

II. THE CONFLICT BETWEEN THE STATE AND FEDERAL COURTS HAS RESTRICTED THE COMMISSION'S ABILITY TO ISSUE AND ENFORCE ITS ORDERS

The PUC has been operating under the strictures imposed by the federal courts since 1988, when the first Amtrak case was decided by the District Court for the Eastern District of Pennsylvania. *National Railroad Passenger Corporation v. Commonwealth of Pennsylvania, Public Utility Commission, et al.*, 665 F.Supp. 402 (E.D. Pa.1988) *aff'd.*, 848 F.2d 436 (3rd Cir. 1988), *cert. denied,* 488 U.S. 893 (1988). In that case, the courts held that the PUC's exercise of jurisdiction over Amtrak under 66 Pa. C.S. §§ 2702 to allocate costs and responsibilities involved in removal of a highway bridge over Amtrak-owned tracks and replacing the structure was preempted by 45 U.S.C. § 546(b).[3] The statute read:

> Amtrak or a rail carrier subsidiary of Amtrak is exempt from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 1, 1981 . . . .

Under the federal court's interpretation of this tax exemption statute, the PUC may determine that Amtrak is a "concerned"

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[3] 45 U.S.C. § 546(b) was repealed by § 7(b) of the Act of July 5, 1994, Pub.L. 103-272, 108 Stat. 1379, and reenacted with linguistic but not substantive change and recodified at 49 U.S.C. § 24301(l) by §1(e) of the same Act, 108 Stat. 904. *See* H.R. Rep. No. 180, 103d Cong., 2d Sess. 1, 3, 5 (1993); amended again in 1997 to read: Amtrak, a rail carrier subsidiary of Amtrak, and any passenger or other customer of Amtrak or such subsidiary, are exempt from a tax, fee, head charge, or other charge, imposed or levied by a State, political subdivision, or local taxing authority on Amtrak, a rail carrier subsidiary of Amtrak, or on persons traveling in intercity rail passenger transportation or on mail or express transportation provided by Amtrak or such a subsidiary, or on the carriage of such persons, mail, or express, or on the sale of any such transportation, or on the gross receipts derived therefrom after September 30, 1981. . . . As amended Publ.L. 105-134, Title I, §§106(b), Title II, § 208, Title IV, §§ 401(1), (2), 402, 415(d)(1), 111 Stat. 2573, 2574, 2585, 2585.

party, but the PUC may not allocate any costs or responsibilities for the repair of a highway bridge over Amtrak right-of-way to Amtrak because "Amtrak's immunity from local "taxes or other fees" in section 546b extends to assessments for local improvements of the kind at issue here." 848 F.2d at 436.

In 1988, Congress extended the federal tax exemption in the Amtrak statute to those commuter authorities which acquired their properties from Conrail. SEPTA sought to obtain judicial affirmation of its interpretation of this section by appealing a case where the Commission had imposed maintenance responsibilities for the Woodland Avenue Bridge in Philadelphia, which carries a city street and SEPTA trolley tracks over and above SEPTA's electrified railroad tracks on its Media/Westchester commuter rail line. In *Southeastern Pennsylvania Transportation Auth. v. Pa. Publ. Util. Comm'n*, 592 A.2d 797 (Pa. Cmwlth. 1991), *alloc. denied,* 531 Pa. 632, 611 A.2d 714 (1992), Commonwealth Court affirmed the Commission's ability to impose costs and maintenance responsibilities on SEPTA, but remanded the proceeding to the Commission for the single purpose of considering the allocation of responsibility for maintaining the bituminous wearing surface between the surrounding the trolley tracks in light of another opinion which it issued at the same time. By Order entered June 21, 1995, the Commission modified its order of July 16, 1990 and directed that SEPTA maintain the bituminous wearing surface on the Woodland Avenue Bridge between the trolley tracks.

During the course of this litigation, SEPTA filed three complaints in the U.S. District Court for the Eastern District of Pennsylvania regarding four other Commission crossing cases in which the Commission had allocated maintenance responsibility to SEPTA. SEPTA filed simultaneous appeals with the Commonwealth Court in those cases, which stayed its cases pending the outcome of the federal court cases.

The District Court held that SEPTA was entitled to the same exemption from Commission cost allocations as Amtrak. *Southeastern Pennsylvania Transportation Auth. v. Pa. Publ. Util. Comm'n*, 826 F.Supp. 1506 (ED Pa.1993), *aff'd w/o opinion*, 27 F.3d 558 (3d Cir.), *cert. denied*, 115 S.Ct. 318 (1994). When the Commission issued its June 21, 1995 order in the Woodland Avenue remand, it imposed costs on SEPTA which were now prohibited by federal law. SEPTA filed a complaint in District Court regarding the matter.

The Commission, believing that the question of the tax exemption was settled, entered into a Consent Decree with SEPTA which was approved by the District Court on January 16, 1996 (a copy of Consent Decree is attached as Appendix F. The Consent Decree prevents the Commission from assessing costs or responsibility for "design, construction, reconstruction, inspection, maintenance, snow, ice, debris or graffiti removal, or repair for any highway bridge, exclusive of catenary or other railroad facility, over SEPTA's right-of-way to SEPTA" unless permitted by subsequent amendment to or appeal of applicable federal law. As a result, there is clear federal law prohibiting the PUC from allocating costs and responsibilities to SEPTA, and equally clear Commonwealth Court law which requires the PUC to do precisely that. A decision from this Honorable Court is necessary to give the PUC clear direction and to allow the PUC to carry out its statutory mandate to prevent accidents and to promote safety at rail-highway crossings in Pennsylvania.

The crux of the conflict is whether or not the PUC's allocation of costs of rail-highway improvement or repair projects, as well as the allocation of responsibility for future maintenance of the crossings, is a "tax or fee" within the meaning of the federal statute. The federal courts have said uniformly that it is, and the Commonwealth Court has said

that it is not, three times directing the PUC to include Amtrak in its allocation of costs and responsibilities and Amtrak crossings.

The Commission cannot comply with both the direction of the Pennsylvania Commonwealth Court and the courts of the Third Circuit. In order to allow the Commission to carry out its responsibilities, it is crucial that this Honorable Court resolve this conflict between the Third Circuit and the Commonwealth Court.

CONCLUSION

This Honorable Court has not yet decided the issue of whether the exemption provided in Amtrak's enabling statute, based on the interstate commerce clause, exempts Amtrak and SEPTA from allocations issued by the PUC, in connection with its statutory mandate to oversee the alteration, relocation, suspension or abolition of highway bridges over railroad rights-of-way in a manner which promotes public safety and prevents accidents. The Federal courts have prohibited the PUC from enforcing any order which assesses such costs and responsibilities, and the Commonwealth Court has remanded the present matter to the Commission, requiring the Commission to treat SEPTA and Amtrak as the Commission treats any concerned party within the meaning of the statute.

This virtual stalemate, where any order that the Commission issues in a case involving SEPTA or Amtrak is guaranteed to be either vacated by the Commonwealth Court or enjoined by the federal courts, creates a situation which endangers the welfare of the users of rail-highway crossings in Pennsylvania. It is vital that this Honorable Court review this issue to provide guidance to the PUC, the Commonwealth Court, and the courts of the Third Circuit.

WHEREFORE, the Pennsylvania Public Utility Commission respectfully requests that this Honorable Court grant the petition for writ of certiorari in this matter.

Respectfully submitted,

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January 3, 2002

APPENDIX A

SUPREME COURT OF PENNSYLVANIA

Nos. 395 MAL 2001 & 439 MAL 2001

CITY OF CHESTER,

Respondent,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner.

CROSS-PETITIONER: CITY OF CHESTER

October 5, 2001, Decided

NOTICE:

DECISION WITHOUT PUBLISHED OPINION

OPINION:

ORDER

PER CURIAM:

AND NOW, this 5th day of October 2001, the petition for allowance of appeal and the cross-petition for allowance of appeal are denied.

APPENDIX B

COMMONWEALTH COURT OF PENNSYLVANIA

No. 2212 C.D. 2000,
No. 2225 C.D. 2000,
No. 2359 C.D. 2000

CITY OF CHESTER,
Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent;

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

PUBLIC UTILITY COMMISSION,
Respondent;

COUNTY OF DELAWARE,
Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent.

April 2, 2001, Argued
April 27, 2001, Decided
April 27, 2001, Filed

BEFORE: HONORABLE JOSEPH T. DOYLE, *President Judge*, HONORABLE DAN PELLEGRINI, *Judge*, HONORABLE WILLIAM J. LEDERER, *Senior Judge*.

OPINION

OPINION BY JUDGE PELLEGRINI

Before this Court are three consolidated petitions for review filed by the City of Chester (City), the County of Delaware (County) and Consolidated Rail Corporation (Conrail) from an order of the Pennsylvania Public Utility Commission (PUC) allocating costs to each of those parties for the repair and maintenance of the Lloyd Street Bridge.

This case involves the Lloyd Street Bridge (Bridge), a three-span structure carrying Lloyd Street over the tracks of National Railroad Passenger Corporation (Amtrak) in the City of Chester, Delaware County, Pennsylvania. The Bridge, which was built in 1899 by the Pennsylvania, Washington and Baltimore Railroad Company to carry Lloyd Street over the railroad right-of-way, is owned by Amtrak which acquired the line of railroad from the Penn Central Railroad Company through Conrail. State Routes 13 and 291 are state highways that feed into or lead off from Lloyd Street near the crossing. Lloyd Street is a city street in the City of Chester. On May 29, 1997, the PUC issued an order affirming the action of the City in posting a five-ton weight limit on the Bridge due to its deteriorating condition. Because no concerned party agreed to accept responsibility for maintaining the structure until it could be replaced, the PUC entered an order instituting an investigation upon its own motion to determine the condition, disposition and responsibility for maintenance of the Bridge.

Public hearings were held before an Administrative Law Judge (ALJ) to determine which party or parties were to be held responsible for repairing and maintaining the Bridge. At the hearings, representatives of Amtrak testified that approximately 54 Amtrak passenger trains operated daily on the line at speeds of up to 90 m.p.h., and Conrail operated approximately four freight trains per day at speeds up to

45 m.p.h., but normally they traveled at 10 m.p.h. Amtrak had maintenance responsibilities for the rail line and facilities located at the subject crossing under its agreement with Conrail. Conrail made payments to Amtrak for its use of the line, and additional payments to serve as compensation for a portion of the financial responsibility for liability that Amtrak agreed to assume under the agreement and were meant to represent Conrail's fair and equitable share of the cost to Amtrak for Conrail's operations on the line. Amtrak's representative testified that Amtrak had maintained the Bridge in the past by removing cross-bracing that was loose, repairing a stringer, affixing protective shields on the Bridge to protect Amtrak's overhead electrical wires, and performing repairs on the Bridge to prevent any structural portions of the Bridge from coming in contact with the catenary wires. Amtrak representatives stated that Amtrak did not agree to perform any work or assume any costs for the repair or replacement of the Bridge. It was Amtrak's position that it was exempt under federal law from contributing to the costs of repairs and maintenance because such costs constituted a tax or fee.

Representatives for the City testified that the City had been declared financially distressed pursuant to the Municipalities Financial Recovery Act,[1] and was currently operating under a recovery plan adopted pursuant to that Act's provisions. The City was the party responsible for pursuing Bridge Bill funding for reconstruction of the Bridge; however, no application had been made for federal or state funding in regard to the Bridge. The City had applied, though, to the Delaware County Planning Department for consideration for Bridge Bill funding to replace the Bridge. The City indicated that it benefited from the existence of the Bridge because it provided continuity to residential neighbors on both sides, provided a link between residential neighborhoods which

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[1] Act of July 10, 1987, P.L. 246, as amended, 53 P.S. §§ 11701.101—11701.501.

encouraged walking and bicycling, and made the street safe for both auto traffic and other users; however, it did not agree to perform any work or assume any costs for any repairs to the Bridge. The City argued that Amtrak should not be excused from contributing to the costs because they did not constitute a tax or fee. It further argued that it would be unreasonable to order the City to pay to maintain the Bridge because it was a distressed municipality.

Representatives for the Southeastern Pennsylvania Transportation Authority (SEPTA) testified that in response to federal court decisions in which SEPTA was found not liable for the costs of highway bridge maintenance,[2] a consent decree was entered into between the PUC and SEPTA wherein the PUC agreed to refrain from assessing it costs or responsibility for the construction, maintenance or repair of any highway bridge.[3] In addition, they pointed out that

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[2] *See Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, 826 F. Supp. 1506 (E.D. Pa. 1993) (SEPTA II), *affirmed per curiam*, 27 F.3d 558 (3rd Cir. 1994), *cert. denied*, 513 U.S. 928 (1994), and *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, 802 F. Supp. 1273 (E.D. Pa. 1992) (SEPTA).

[3] Specifically, the consent decree provided in relevant part:

> 1. Under 49 U.S.C. §§ 24301(1) and 24501(g), the Commission is barred hereafter from assessing or continuing to assess upon SEPTA the cost or responsibility of or for design, construction, reconstruction, inspection, maintenance, removal of snow, ice, debris or graffiti, or repair ("Assessed Cost or Responsibility") of any Highway Bridge (further defined for this Consent Decree to also include all components, including without limitation, approaches, substructures and superstructures, highway decking, as well as railings, walls, fences and shielding of any kind, and stairways and ramps attached to the bridge (except where expressly accepted by SEPTA, either in writing to the Commission or on the record of a Commission proceeding, as a necessary part of an adjacent SEPTA-owned railroad station), and all lighting, drainage and highway signage. The term "Highway Bridge" shall not include

SEPTA had not performed any work at the subject crossing and did not agree to assume any future maintenance responsibilities for any part of the Bridge or its approaches. However, they admitted that SEPTA received a benefit from the crossing because having a separated-grade crossing was preferable to having an at-grade crossing. Representatives for the Pennsylvania Department of Transportation (PennDot), which had intervened in the matter, testified that PennDot did not receive any benefit from the Bridge. Specifically, they pointed out that any benefit inured to the City as the Lloyd Street crossing served as a collector street to City streets and to channel traffic into an arterial system that contained numerous roadways, only two of which were state highways. The primary purpose was to serve as a link for local neighborhood roads, and there was no evidence to conclude that Lloyd Street served as a necessary or vital link in the State highway system.

Conrail representatives testified that it had not performed any maintenance at the crossing but recognized that a benefit

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any railroad catenary attachment on a Highway Bridge, and shall not include any railroad facilities beneath a Highway Bridge.

2. SEPTA is relieved by the above-referenced federal law from any further obligations under all prior orders of the Commission (which is defined to also include its predecessor, the Pennsylvania Public Service Commission) assigning to SEPTA any Assessed Cost or Responsibility for any Highways Bridges at any above-grade crossings under the Commission's jurisdiction.

3. Unless permitted by subsequent amendment to, or repeal of, the above-referenced federal law, henceforth in all PUC above-grade crossing proceedings involving SEPTA railroad operations or SEPTA railroad rights-of-way, whether such proceedings are initiated by the Commission, SEPTA or by any other party, the Commission shall not assign to SEPTA, either on a temporary or permanent basis, any Assessed Cost or Responsibility in violation of SEPTA's statutory exemption with respect to Highway Bridges as set forth in paragraph no.1 of this Consent Decree.

existed because it prevented accidents involving motor vehicles and trains and reduced Conrail's liability for the same. Nonetheless, it argued that it should not be responsible for any costs for repairs or maintenance because it did not own any property on the rail line and only operated on the line pursuant to an operating agreement with Amtrak for which it paid Amtrak a fee to maintain the rail line and facilities.

The ALJ issued a Recommended Decision allocating to the City 75% of the costs to furnish all materials and perform all work necessary to maintain the substructure, superstructure and deck of the Bridge. The remaining 25% of the costs were divided among Conrail (15%), the County (5%) and PennDot (5%). The ALJ determined that Amtrak was exempted from contribution based on federal law, as was SEPTA based on the consent decree between SEPTA and the PUC in an unrelated matter.

The City, Conrail, PennDot and the County filed exceptions to the Recommended Decision. The PUC denied all of the exceptions and issued an order adopting the ALJ's Recommended Decision specifically providing that the City was to perform the following work and incur the following costs and expenses with regard to the Bridge:

> a. its initial cost and expense, furnish all materials and perform work necessary to maintain the substructure, superstructure and deck of the Lloyd Street rail-highway bridge crossing; all in a safe and satisfactory condition;
>
> b. bear all of the remaining costs in furnishing material and performing work in accordance with ordering paragraph No. 7 hereof;
>
> c. at its sole cost and expense, within 120 days from the date of entry of this Opinion and Order, perform an in-depth inspection of the entire structure and prepare and submit to our Bureau of Transportation and Safety,

and to all Parties hereto, a detailed in-depth inspection report which shall include, *inter alia*, a structural analysis of the bridge, its load-carrying capacity, what maintenance work the City of Chester has performed since the date of entry of the instant Opinion and Order, any changes in the condition of the bridge, which would affect the safety and well being of the traveling public, any specific recommendations as to what additional repairs and/or work should be performed and when same will be done, together with the status of its efforts to secure funding for bridge replacement. In addition to the foregoing, the City of Chester, at its sole cost and expense, shall perform an in-depth inspection of the structure at least once every year thereafter and shall submit to the Commission and the Parties a detailed in-depth inspection report setting forth therein the foregoing items of information;

d. at least fifteen (15) days prior to the start of each inspection and/or maintenance work, shall notify all interested Parties of the actual date on which each such inspection and/or work shall begin;

e. shall reimburse the Consolidated Rail Corporation for 85% of the costs incurred by Conrail in complying with Ordering Paragraph 13 [4] in the following proportions:

(a) City of Chester-75%

(b) The County of Delaware-5%

(c) Pennsylvania Department of Transportation-5%

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[4] Paragraph 13 provides: That the Consolidated Rail Corporation, at its initial cost and expense, provide watchmen and flagmen, if necessary, and any and all other protection necessary for all rail operations, including those of Conrail, Amtrak, and SEPTA, during performance of the maintenance and inspection work ordered in Ordering Paragraphs 7, 10 and 11 hereof.

The City, County and Conrail filed petitions for review [5] from that order that have been consolidated for appeal and are now before this Court.[6]

I.

Initially, the City, County and Conrail contend that the PUC erred in failing to allocate any costs to either Amtrak and/or SEPTA based on this Court's decision in *City of Philadelphia v. Pennsylvania Public Utility Commission*, 676 A.2d 1298 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 546 Pa. 657, 684 A.2d 558 (1996), *cert. denied*, 520 U.S. 1155 (1997). In City of Philadelphia, we held that both Amtrak and SEPTA were to be allocated costs associated with the repair and maintenance of certain bridges. As to Amtrak, we determined that although it was exempted from paying taxes imposed by a state agency pursuant to 49 U.S.C. § 23401(l), the allocation of costs did not constitute a tax. Regarding SEPTA, we found that the consent decree between the PUC and SEPTA did not bind this Court and deprived the parties that were not a party to that decree of their due process right to a full and fair hearing.

While acknowledging our decision, the PUC, nonetheless, explains that it chose to follow federal law instead which precludes allocating costs to Amtrak due to a permanent injunction, see *National Railroad Passenger Corporation v. Pennsylvania Public Utility Commission and Township of Tredyffrin*, 848 F.2d 436 (3d Cir. 1988), *cert. denied*, 488

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[5] Neither Amtrak nor SEPTA participated in the appeal. PennDot did not file an appeal.

[6] Our scope of review of the PUC's order is to determine whether constitutional rights were violated, whether errors of law were committed, or whether findings of fact are supported by substantial evidence. *Atglen-Susquehanna Trail, Inc. v. Pennsylvania Public Utility Commission*, 717 A.2d 581 (Pa. Cmwlth. 1998), *petition for allowance of appeal denied, 559 Pa. 695, 739 A.2d 1059 (1999).*

U.S. 893, 109 S. Ct. 231, 102 L. Ed. 2d 220 (1988), and the consent decree which precludes allocating costs to SEPTA. Regarding Amtrak's exclusion from any cost allocation and the PUC's reliance on federal law, we stated in City of Philadelphia that decisions of inferior federal courts are not binding on state courts. *Rader v. Pennsylvania Turnpike Commission*, 407 Pa. 609, 182 A.2d 199 (1962); *Lilley v. Johns-Manville Corporation*, 408 Pa. Super. 83, 596 A.2d 203 (Pa. Super. 1991), *petition for allowance of appeal denied*, 530 Pa. 644, 607 A.2d 254 (1992). Further, because state courts share responsibility for the application and enforcement of federal law, state courts may interpret federal law. *Howlett v. Rose*, 496 U.S. 356, 110 L. Ed. 2d 332, 110 S. Ct. 2430 (1990). "Although having concurrent rather than subordinate jurisdiction to decide the issue of federal law before us, we would nonetheless normally find the Third Circuit decision of great probity in interpreting the federal statute. However, that does not hold true when there is a circuit court split and our own analysis reveals that the Third Circuit is clearly wrong." *City of Philadelphia*, 676 A.2d at 1305 n.10. Because the PUC is a state administrative agency over which state courts have jurisdiction to determine what law it is to apply, including the interpretation of a federal law unless reversed by the United States Supreme Court, it was required to apply the holding in City of Philadelphia to this case.

As to holding that SEPTA is not responsible for its share of crossing costs because it had entered into a consent decree that in future cases it would not allocate any cost that was its fair share for maintaining a crossing, that consent decree cannot in any way bind anyone not a party to that agreement. None of the parties to the proceeding underlying this appeal were a party to the proceeding involving the consent decree, and by deferring to the consent decree, the PUC is violating the due process rights of those who were not a party to that

settlement.[7] Because the PUC is constrained to follow City of Philadelphia, this case is remanded to the PUC to conduct an additional hearing for the purpose of determining the allocation of costs associated with the Bridge that include Amtrak and SEPTA as well as all of the other parties involved.[8]

II.

The City also contends that the PUC erred by allocating to it 75% of the costs of maintaining and repairing the Bridge because it has been designated a financially distressed municipality under the Municipalities Financial Recovery Act and is fiscally unable to make the repairs and provide the maintenance as ordered. It explains that the City adopted a Municipal Recovery Plan pursuant to Section 245 of the Act, *53 P.S. § 11701.245*, under which it currently operates in order to operate on a balanced budget basis and provides the following excerpts from the Introduction to the Recovery Plan in support of the proposition that it is financially unable to contribute to the Bridge's repairs and maintenance:

> The City has operated for several years with a major imbalance between revenues and expenditures. Prac-

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[7] In City of Philadelphia, we noted:

> The PUC entry into a consent decree is problematic. The municipalities or private entities could make valid arguments that neither the federal courts or this court has considered. By entering into the consent decree agreeing not to allocate any costs to SEPTA, the PUC has prejudged those arguments and deprives those parties of their due process right to a full and fair hearing. Of course, we are not bound by the consent decree.

676 A.2d at 1307 n.16.

[8] The City, County and Conrail also contend that the PUC failed to consider relevant factors when determining the allocation of costs. As evidenced by the fact that we are remanding this case for an additional hearing so that the PUC can include Amtrak and SEPTA in the cost allocation, we obviously agree.

tically speaking the City has only limited ability to raise additional funds through taxation or borrowing, and current police and fire contracts restrict expenditure reductions. There are now few available alternatives for the City to pursue to achieve a balanced budget.

The City's ability to resolve its financial crisis outside of bankruptcy is absolutely dependent upon the aggressive implementation of this Recovery Plan in connection with the strong leadership of the Mayor and City Council. The Plan calls for the introduction of strong central administration of the City, professional management of day-to-day operations, strict and consistent budgetary, purchasing and other basic financial management controls and drastic reduction of operating expenditures.

* * *

If all of these steps are taken by the City, there is an opportunity for the City to climb out of fiscal chaos. Without their successful implementation, the City's future is bleak and its fiscal options few.

The PUC, however, argues that despite the City's financial status, which it contends is not controlling in determining the proper cost allocation, the City was the party responsible for pursuing the Bridge Bill funding for reconstruction of the Bridge. Additionally, it derives benefits from the existence of the Bridge because it provides continuity to residential neighbors on both sides and provides a link between residential neighborhoods and makes the crossing safe for traffic. We agree.

Initially, we should note that nothing in the Act provides that a municipality should get any consideration from paying bills due and owing or that it is otherwise exempt. The financial condition of a party and its ability to pay the fees associated with the cost of maintaining a crossing is not controlling or determinative for purposes of allocating

costs regardless of the party. *East Rockhill Township v. Pennsylvania Public Utility Commission*, 115 Pa. Commw. 228, 540 A.2d 600 (Pa. Cmwlth. 1988). Amtrak and SEPTA both have financial difficulties but that does not mean they should be excluded from the cost allocation for that reason. The costs associated with the maintenance and repair of the Bridge are costs of doing business and are no different than when the City buys materials or supplies for which its financial condition is not given any consideration, and the PUC was correct by not considering the City's financially distressed status when allocating costs.

III.

The County also contends that the PUC violated its due process rights by failing to provide it with notice of any of the hearings underlying this appeal, and, therefore, it cannot impose any obligation upon it for payment of costs associated with the Bridge. However, all that the record contains is a copy of a return receipt dated October 8, 1997, signed for by an agent of the County and does not provide us with enough information to make such a determination. Nonetheless, because we are remanding this case for an additional hearing to supplement the record, the County is on notice and can provide any evidence or call any witnesses that it believes the PUC should consider without sustaining any prejudice or due process violation. *See Katruska v. Bethlehem Center School District, Pa.*, 767 A.2d 1051 (filed 2001).

Accordingly, for all of the above-stated reasons, the case is remanded to the PUC for an additional hearing and to reapportion costs associated with repairing and maintaining the Lloyd Street Bridge crossing between the parties, including Amtrak and SEPTA.

DAN PELLEGRINI, JUDGE

ORDER

AND NOW, this 27th day of April, 2001, the order of the Pennsylvania Public Utility Commission dated September 1, 2000, is vacated, and the case is remanded to the Pennsylvania Public Utility Commission to hold an additional hearing and issue an adjudication to apportion costs for the repair and maintenance of the Bridge between the present parties, the National Railroad Passenger Corporation, and the Southeastern Pennsylvania Transportation Authority in accord-ance with the foregoing opinion within 120 days of this order. The PUC is directed to certify a supplemental record within 20 days after that order and the chief clerk is directed to establish a briefing schedule where any of the parties may set forth reasons why the PUC decision is erroneous. We retain jurisdiction.

DAN PELLEGRINI, JUDGE

APPENDIX C

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held September 7, 2001

Commissioners Present:

Glen R. Thomas, Chairman
Robert K. Bloom, Vice Chairman
Aaron Wilson, Jr., Abstaining
Terrance J. Fitzpatrick

I-00970070

Investigation upon the Commission's own motion to determine the conditions, disposition, and responsibility for maintenance of the existing crossing structure carrying Lloyd Street above-the-grade of the tracks of National Railroad Passenger Corporation in the City of Chester, Delaware County (AAR 550 958 N)

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition are the Exceptions filed by several Parties to the Recommended Decision on Remand (Recommended Decision) issued herein on August 7, 2001, by Administrative Law Judge (ALJ) Herbert Smolen.

On August 13, 2001, Norfolk Southern Railway Company (Norfolk Southern or NS) filed Exceptions. On August 14, 2001, the Commission's Bureau of Transportation and Safety (BTS) filed Exceptions. On August 15, 2001, the County of Delaware (County) filed Exceptions. On August 16, 2001, the Commonwealth of Pennsylvania, Department

of Transportation (PennDOT) filed Exceptions. Also on August 16, 2001, Southeastern Pennsylvania Transportation Authority (SEPTA) and the City of Chester (City) each filed Exceptions. On August 17, 2001, National Railroad Passenger Corporation (Amtrak) filed Exceptions.

Reply Exceptions were filed by the following Parties: the County, on August 21, 2001; PennDOT, on August 22, 2001; and by the City, on August 22, 2001.

History of Proceeding

By Order entered October 6, 1997, the Commission instituted an investigation to determine the condition and responsibility for maintenance of the crossing structure carrying Lloyd Street above-the-grade of the track of Amtrak in Chester, Delaware County, Pennsylvania.

A prior Commission Order entered on May 29, 1997, at Commission Docket No. M-00970921, affirmed the action of the City in posting the Lloyd Street Bridge for a five-ton weight limit. A Field Conference was held on July 14, 1997, whereat no concerned Party agreed to accept responsibility for maintaining the structure. Thereupon, the Commission instituted an investigation, and directed that PennDOT, the City, the County, Amtrak, SEPTA, Philadelphia Electric Company (PECO), Bell Atlantic-PA [1] (Verizon PA), Philadelphia Gas Works (PGW) and AT&T Communications be made Parties to the proceeding.

Subsequently, hearings were held on April 28, 1998, July 7, 1998, and November 13, 1998, whereat the BTS, Amtrak, SEPTA, PennDOT, Conrail and Chester presented testimony. The County did not appear. The record at that time consisted of 207 pages of transcript and various exhibits. Briefs and Reply Briefs were filed. The ALJ filed his

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[1] We note that this corporate entity is now known as Verizon Pennsylvania Inc. It will be referred to herein as Verizon PA.

Recommended Decision under date of April 29, 1999. That Recommended Decision was adopted by the Commission and was issued on March 14, 2000. Thereafter, Exceptions and Reply Exceptions were filed as noted above.

By Opinion and Order entered on September 1, 2000, the Commission denied the Exceptions of Chester, Amtrak, Conrail, PennDOT and the County for those reasons which more fully and appear in the Opinion and Order. Additionally, the Recommended Decision of the ALJ was adopted, consistent with the Opinion and Order. The allocation of costs and work to be performed was ordered as follows:

(a) 75% of the costs to furnish all materials and perform all work necessary to maintain the substructure, superstructure and deck of the bridge was allocated to the City of Chester which was to perform the work;

(b) the remaining 25% of the costs was divided among Conrail (15%), the County (5%) and PennDOT (5%).

(c) Amtrak was exempted from contribution based upon 49 U.S.C. § 2431(1), and SEPTA was exempted from contribution based on a consent decree between SEPTA and the Public Utility Commission in a separate matter; *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 95-CV-4500 (January 19, 1996).

The City, County and Conrail filed *Petitions for Review* in the Commonwealth Court of Pennsylvania, which were consolidated. By Opinion and Order dated April 27, 2001, the Commonwealth Court vacated the September 1, 2000 Order of the Commission and remanded the proceeding to the Commission. The purpose of the Remand was for the

Commission to hold an additional hearing and to issue an adjudication to apportion costs for the repair and maintenance of the Lloyd Street Bridge among the Parties to the proceeding, *including Amtrak and SEPTA*.

In accordance with the remand Order, and pursuant to due notice, a hearing was held on July 13, 2001. SEPTA, Chester, the County, Norfolk Southern, Conrail, Amtrak, the BTS and PennDOT participated at the hearing. The ALJ placed in the record a Letter dated July 11, 2001, from counsel for CSX Transportation (CSX) which indicated that CSX would not be attending the hearing. The Letter also stated, *inter alia*, that CSX had a right of access to Amtrak's rail line at the site of the crossing. CSX however, did not currently operate over the line, nor did it have any definite plans at this point to do so in the future. (Tr., p. 216).

In addition, a July 12, 2001 Letter, from counsel for Verizon PA was placed in the record stating, *inter alia*, that although Verizon PA had facilities in the area of the crossing, it (Verizon PA) was not seeking reimbursement of any costs in connection with the project. Verizon PA further stated that it was willing to inspect and maintain its own facilities at its sole cost and expense, but would not agree to bear any costs or responsibilities for inspection or maintenance of the crossing structure. Finally, Verizon PA stated that by reason of the foregoing, it did not intend to participate at the hearing. (Tr., p. 217).

ALJ Smolen incorporated into the record of the instant remand proceeding the evidentiary record of the prior hearings held in this matter (Tr., pp. 219-220). Thereupon, the hearing on remand proceeded and produced an additional record consisting of a transcript of 121 pages (Tr., pp. 208-328) and four additional exhibits (Delaware County—1; City of Chester—2 late-filed; and Norfolk Southern—1). Briefs and Reply Briefs were filed.

In the Recommended Decision, issued on August 7, 2001, ALJ Smolen recommended an allocation of costs and responsibilities for the Lloyd Street Bridge, including Amtrak and SEPTA in that allocation, in compliance with the direction of the Remand Order from the Commonwealth Court. (R.D., pp. 34-35). Exceptions and Reply Exceptions to the August 7, 2001 Recommended Decision were filed as above noted.

Discussion

In his Recommended Decision, ALJ Smolen noted that all the Findings of Fact set forth in the Recommended Decision of April 29, 1999, were incorporated and made part of the instant proceeding, to the extent that they are consistent with the ALJ's additional Findings of Fact. ALJ Smolen also made additional Findings of Fact from No. 87 [2] to No. 139. (R.D., pp. 4-12).

ALJ Smolen also drew eleven Conclusions of Law (R.D., pp. 36-38). We shall adopt and incorporate herein by reference the ALJ's additional Findings of Fact and Conclusions of Law to the extent that they are not expressly or by necessary implication overruled or modified by this Opinion and Order.

Initially, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. (*University of Pennsylvania, et al. v. Pennsylvania Public Utility Commission*, 86 Pa. Commw. 410, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984) (*University of Pennsylvania v. Pa. PUC*). Any exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

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[2] The ALJ commenced the numbering of the additional Findings of Fact at Number 87, he stated, in order to avoid confusion and for the sake of uniformity and clarity. (R.D., p. 4).

Exceptions of the BTS and Norfolk Southern

The BTS files two Exceptions to the Recommended Decision. Norfolk Southern files six Exceptions to the Recommended Decision.

The BTS's first Exception and Norfolk Southern's sixth Exception will be considered jointly, since they are inter-related. In those Exceptions, the BTS and Norfolk Southern object to Ordering Paragraph No. 14 of the Recommended Decision, which is as follows:

> 14. That should the conflicting federal/state judicial decisions be resolved requiring application of the federal exemptions in connection with the allocation of costs and work responsibilities at rail-highway crossings, then and in such event, the allocations of costs upon Amtrak and SEPTA set forth in this Order are hereby rescinded and revoked; whereupon any such costs advanced by Amtrak and SEPTA shall be refunded to them and the matter shall be set down for determination of the reallocation of said costs.

The BTS and Norfolk Southern contend that the foregoing Ordering Paragraph is not necessary. (BTS Exc., p. 1-2; NS Exc., pp. 4-5).

On review of these Exceptions, we find them to be meritorious. We reach this conclusion because we reason that, if a future court proceeding in any way negates the Commission's Order, the Commission can issue a subsequent Order that would reallocate the costs from Amtrak and SEPTA to other parties. At the same time, the Commission can address reimbursement of any costs that Amtrak and SEPTA may have advanced. We do not believe that it would be advisable, at this time, to issue an order that may become partially revocable depending on some future court action.

We can only issue a decision based on the facts and law that exist at the time of the decision and, therefore, it is unnecessary to address future events that may not occur.

Accordingly, Ordering Paragraph No. 14 will be stricken. The BTS's first Exception and Norfolk Southern's sixth Exception are granted.

In its second Exception, the BTS excepts to Ordering Paragraph No. 15 of the Recommended Decision, which is as follows:

> 15. That nothing herein shall preclude or prevent any party from seeking a reallocation of cost and maintenance responsibilities for the Lloyd Street rail-highway crossing in the future by reason of changed circumstances or conditions.

The BTS also contends that this Ordering Paragraph is not necessary. (BTS Exc., p. 2).

On review of this Exception, we find it to be meritorious. We agree that the foregoing Ordering Paragraph is not necessary. Section 703(g) of the Public Utility Code (Code), 66 Pa. C.S. § 703(g), sets forth the authority of the Commission to rescind or amend any order it issues. Additionally, the decisions of the appellate courts of the Commonwealth interpreting this statute have set forth under what circumstances the Commission may rescind or amend an order. Therefore, under Section 703(g), any party to a proceeding is authorized to petition the Commission for rescission or amendment of any entered order. Accordingly, Ordering Paragraph No. 15 will be stricken from the instant Opinion and Order as not necessary.

Accordingly, the BTS' second Exception is granted.

In its first Exception, Norfolk Southern objects to the reference to Norfolk Southern "owning" a freight service

easement at the subject crossing, as stated in Finding of Fact No. 97, on page 6 of the Recommended Decision, which reads as follows:

> 97. Norfolk Southern desires to increase the rail business that it would operate under this bridge and is aware that senior management is presently negotiating regarding future business. (N.T., pp. 289, 294, 309). Norfolk Southern owns a freight service easement at the crossing.

Norfolk Southern contends, instead, that it leases the freight service agreement, which is owned by Pennsylvania Lines LLC. (Tr., p. 272; Norfolk Southern Exh. No. 1). (NS Exc., p. 1).

We note that Finding of Fact No. 89, on page 5 of the Recommended Decision, reads as follows:

> 89. Pennsylvania Lines LLC, which is owned by Consolidated Rail Corporation, leases the rights it acquired from Conrail to Norfolk Southern (N.T. 272; Norfolk Southern Exh. No. 1).

We find that the evidentiary record herein supports Finding of Fact No. 89 as reflecting the actual state of affairs with regard to the pertinent lease. Accordingly, in order to clear up this ambiguity in the Recommended Decision, we shall strike the last sentence from Finding of Fact No. 97.

In its third Exception, Norfolk Southern objects to Conclusion of Law No. 4 as found on page 36 of the Recommended Decision, which reads as follows:

> 4. Norfolk Southern Railway Company acquired Consolidated Rail Corporation effective June 1, 1999. (N.T. 269).

Norfolk Southern avers, to the contrary, that Norfolk Southern and CSX Corporation own Consolidated Rail Corporation. (NS Exc., p. 2).

On review of this Exception, we find it to be meritorious. Indeed, Finding of Fact No. 90, on page 5 of the Recommended Decision reads as follows:

> 90. Norfolk Southern Corporation and CSX Corporation own Consolidated Rail Corporation. (N.T. 272).

We find that the evidentiary record herein supports Finding of Fact No. 90 as reflecting the actual state of affairs with regard to the ownership of Consolidated Rail Corporation. Accordingly, in order to clear up this ambiguity in the Recommended Decision, Conclusion of Law No. 4 shall be stricken.

Accordingly, Norfolk Southern's Exceptions Nos. 1, 3, and 6 are granted. Norfolk Southern's remaining Exceptions are denied. *University of Pennsylvania v. Pa. PUC, supra.*

Exceptions of the County

The County files two Exceptions to the Recommended Decision that will be considered jointly, since they are interrelated. The County contends that, while it takes no exception to the ALJ's Findings of Fact as contained in his Recommended Decision, the reasoning used in the ALJ's allocation of costs in this matter fails to consider the contribution of liquid fuel money that the County makes to the City. The County further contends that the ALJ also failed to consider the policy implications that such allocation may have on the distribution of liquid fuel money to other municipalities within the County. (County Exc., pp. 1-4).

The City responds to the County's Exceptions on this issue, stating that those Exceptions are misplaced. Specifically, the County argues that no credit for the liquid fuels tax fund already allocated to the City should be granted to the County. (City R. Exc., pp. 1-2).

On review of the County's Exceptions, we find them not to be meritorious. Specifically, the County contended that the ALJ did not, in his recommended allocation of responsibility

for the costs of repair and maintenance for the pertinent bridge, give any weight to the liquid fuel funds that the County has already provided to the City. Even if that statement were correct, however, we conclude that the ALJ was correct in that assessment.

As presented by the County, it has received from the Commonwealth for several years liquid fuel tax funds that have been distributed to several municipalities for repair and maintenance of bridges and roadways. The evidentiary record established that the City has used its allocated share of those funds for the repair and maintenance of eighty-seven miles of City streets and highways, as approved by PennDOT. (R.D., pp. 10-11). Presumably, those repairs and maintenance were needed, or PennDOT would not have approved them.

The County now seeks to convince us that the City should have, instead, devoted those sums toward the repair and maintenance of the pertinent bridge. This argument is not persuasive. Although we may consider the cause of the current state of the bridge's deterioration, our purpose here is not to place blame for the past. Rather, we seek to ensure that the bridge is properly maintained in the future. We identify the County as a party which benefits from the existence of this crossing since its citizens use it. The source of the funding that either the County or the City uses to maintain the bridge is beyond our jurisdiction.

Accordingly, for the above reasons, the County's Exceptions are denied.

Exceptions of PennDOT

PennDOT files two Exceptions to the Recommended Decision that will be considered jointly, since they are interrelated. In those Exceptions, PennDOT objects to the ALJ's conclusion that, since PennDOT receives a benefit from the existence of the pertinent grade-separated crossing

and bridge, PennDOT should reimburse the City for five percent of the City's cost for the maintenance of the substructure, superstructure and deck. (R.D., pp. 38-39, Proposed Ordering Paragraph No. 2).

PennDOT furthermore contends that the ALJ's conclusion, and his proposed allocation to five percent of the costs to PennDOT, is not supported by the evidentiary record. PennDOT avers that the liquid fuel funding that the City receives from PennDOT, *via* the County, adequately satisfies any duty PennDOT may have in relation to Lloyd Street and that any additional allocation to PennDOT in this case would constitute an unwarranted "double dip" into Commonwealth funds. (PennDOT Exc., pp. 2-7).

The City rejoins that the ALJ had properly allocated to PennDOT a portion of the costs for the repair and maintenance of the pertinent bridge. (City R. Exc., pp. 2-3).

PennDOT's statement that "[T]he Commission's original allocation in this matter constitutes a doubledip into Commonwealth funding, at the expense of other equally deserving and needy communities." (PennDOT Exceptions, pp. 5-6). This statement is not convincing. There is no evidence that PennDOT's grant of liquid fuels tax money to a community acts as a legal bar to the Commission's allocation of costs to PennDOT for a rail-highway bridge which carries a local road.

In addition, the Commission's allocation of costs in rail-highway crossing cases is based on the circumstances of the case. It is not based on the sourse of the funding that a party found to benefit from the crossing may use. We may safely assume that PennDOT will have sufficient funding to fulfill its statutory mandates or the Legislature will act to rectify the situation. The identity of the fund from which PennDOT's check is ultimately drawn will not affect the Commission's finding that the state highway system benefits form the Lloyd Street Bridge. (Finding of Fact No. 136, R.D., p. 11).

We also find that Lloyd Street connects with two State highways (Initial Hearing Tr., pp. 25, 164). The fact that another local street nearby is even more of an asset to the state highway system does not change the fact that Lloyd Street is also a feeder. We furthermore find that the evidentiary record does not support PennDOT's assertion that it is already fully funding any conceivable obligation it might have in relation to Lloyd Street. (PennDOT Exc., p. 5). We, therefore, conclude that an allocation of costs to PennDOT by the Commission is proper under the facts and evidence presented herein.

Accordingly, PennDOT's Exceptions are denied.

Exceptions of the City

In its Exception No. 3, the City argues that PennDOT should be made to bear more than five percent of the costs, as recommended by the ALJ, for the maintenance and upkeep of the Lloyd Street Bridge. To buttress its argument, the City cited *Com. of Pa., Department of Transportation v. Pa. PUC*, 469 A.2d 1149 (Pa. Commw. 1983) (*PennDOT v. Pa. PUC*) for the proposition that substantial percentages have been allocated to PennDOT in rail-highway cases where the highway was not a state highway. (City Exc., pp. 2, 7-10).

PennDOT responds to that Exception of the City, stating that, notwithstanding PennDOT's position that it should not be subject to any allocation in this case, the City's conclusion is not supported by the cited case. (PennDOT R. Exc., pp. 2-3).

We find that the case of *PennDOT v. Pa. PUC, supra*, is not supportive of the proposition for which the City advanced it. In that case, the Commonwealth Court noted that the allocation against PennDOT, which was forty percent, was warranted because the structure in question once carried a state highway. Moreover, PennDOT had therein a continuing obligation for paving maintenance on the structure under

previous Commission Orders. (469 A.2d at 1153). In the instant proceeding, Lloyd Street was never a State highway, and PennDOT was never under any obligation to maintain any portion of the Lloyd Street structure.

Accordingly, we find the ALJ's recommended five percent allocation to PennDOT to be, in accord with the evidentiary record and the applicable law. For these reasons, the City's Exception No. 3 is denied.

Similarly, in its Exception No. 4, the City objects to the ALJ's recommended allocation of five percent of the costs for repair and maintenance of the pertinent bridge to the County, arguing that the County should receive a bigger percentage of the costs of maintenance associated with this project. In support of this argument, the City cites to *County of Chester v. Pa. PUC*, 408 A.2d 552 (Pa. Commw. 1979) (*County of Chester v. Pa. PUC*). (City Exc., pp. 3, 7-10).

The County rejoins that there is no basis in the evidentiary record herein for an increased allocation of financial responsibility to the County. The County further contends that the cited case of *County of Chester v. Pa. PUC, supra*, is not relevant to the instant proceeding. Specifically, the County noted that the City had cited that case for the proposition that the County should receive an increased allocation. (County R. Exc., pp. 1-3).

For the reasons we have outlined above, in our discussion and disposition of the County's Exceptions, we conclude that the City's Exception No. 4 is not meritorious. As we have discussed above, a five percent allocation for the costs of repair and maintenance of the bridge to the County, as recommended by the ALJ, is reasonable, and well supported by the evidentiary record. Additionally, we note that the in the case cited by the County, *County of Chester v. Pa. PUC, supra*, Chester County was allocated twenty-five percent of the financial responsibility for rebuilding a railroad bridge

overpass. However, we further note that the amount of the allocation to Chester County was not at issue in that decision. Rather, the issue therein was whether Chester County was an interested party who could be allocated any responsibility at all.

For these reasons, the City's Exception No. 4 is denied.

Exceptions of Amtrak and SEPTA

Amtrak's Exception No. 7 and SEPTA's Exception No. 4 will be discussed jointly, since they are interrelated. In those Exceptions, the Parties argue that the Commission should not seek to resolve this conflict of law by an appropriate action in a court of competent jurisdiction. (Amtrak Exc., p. 8; SEPTA's Exc., pp. 6-8).

PennDOT responds to those Exceptions, arguing that the Commission has no choice but to seek such a resolution due to the fact that Amtrak and SEPTA refuse to recognize the validity of the Commonwealth Court's jurisdiction and orders. PennDOT avers that, for its part, it recognizes that the fundamental problem presented by this proceeding is that the Commission is theoretically bound by two orders, and that compliance with both of them is impossible. (PennDOT R. Exc., pp. 4-5).

We conclude that Amtrak's Exception No. 7 and SEPTA's Exception No. 4 are not meritorious. We will discuss the issue raised by those Exceptions at greater length *infra*, in the Conflict of Law section of this Opinion and Order.

Conflict of Law Issue

We wish to emphasize that the paramount consideration in proceedings of this nature, from our point of view, is the promotion and enhancement of the safety of the public and the prevention of accidents. Inherent therein is the necessity to identify the contributing factors to unsafe conditions at rail-highway crossings and approaches thereto.

Among the factors which the Commonwealth Court noted in the *Greene Township* [3] case as relevant to an allocation of costs in rail-highway crossing cases are the following: (1) which party built the crossing; (2) whether a roadway existed before or after the construction of the crossing; (3) relative benefit conferred on each party with the construction of the crossing; (4) whether either party is responsible for the deterioration of the crossing which has lead to the need for its repair, replacement or removal; and (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing. While the Commission has considered these factors to be relevant in the past, this in no way limits the factors that the Commission can consider. (*Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth. 1996)).

We note that the Parties in the instant matter recognize and understand that the Commission's authority to assign work and allocate costs is complicated where the facilities of Amtrak and SEPTA are involved at the crossing. The current status is that the Commonwealth Court of Pennsylvania and the United States Court of Appeals for the Third Circuit differ over whether the Commission has ~~the~~ authority to allocate costs and assign work to Amtrak and SEPTA for rail-highway bridge crossings.

As to Amtrak, the Commonwealth Court has held that the Commission may allocate highway bridge costs to Amtrak while the Court of Appeals held that it may not. (*See National Railroad Passenger Corporation v. Commonwealth of Pennsylvania Public Utility Commission*, 655 F. Supp. 402 (E.D. Pa. 1987), *Aff'd* 848 F.2d 436 (3rd Cir. 1988), *cert. Denied*, 108 S.Ct. 231 (1988) and *City of Philadelphia v. Pa. PUC*, 676 A.2d 1298 (Pa. Commw. Ct. 1996), *alloc. Denied*,

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[3] *Greene Township v. Pa. PUC*, 668 A.2d 615 (Pa. Commw. Ct. 1995).

546 Pa. 654, 682 A.2d 558 (1996), *cert. Denied*, 117 S. Ct. 1334 (1997); *Parkesburg Borough v. Pa. PUC*, 681 A.2d 872 (Pa. Commw. Ct. 1996)).

As to SEPTA, the Commonwealth Court has likewise held that the Commission may allocate costs to SEPTA, while the Court of Appeals has held that it may not. (*See SEPTA v. Pa. PUC*, 140 Pa. Commw. Ct. 270, 592 A.2d 797 (1991), *alloc. Denied*, 611 A.2d 714 (Pa. 1992) and *SEPTA v. Pa. PUC*, 826 F. Supp. 596 (E.D. Pa. 1993), *Aff'd.*, 27 F.3d 558 (1994), *cert. Denied*, 115 S. Ct. 318 (1994)). The matter is further complicated by a Consent Decree entered into between the Commission and SEPTA; that Consent Decree bars the Commission from assigning costs and responsibility for highway bridges to SEPTA.

In the instant matter, as outlined above, the Commonwealth Court's Order vacates the Commission's Order of September 1, 2000, which Order complied with the Third Circuit decisions and observed the Consent Decree. The Commonwealth Court Order further remands the proceeding to the Commission to conduct an additional hearing and allocate costs among the parties, including Amtrak and SEPTA. This mandate is interpreted to mean that Amtrak and SEPTA are to be included for consideration for cost allocations but not that costs *must* be allocated to them. In addition, the Commonwealth Court held that because the City, Delaware County and Conrail were not parties to the consent decree between the Commission and SEPTA, their due process rights had been violated by the Commission's observance of the Consent Decree's prohibition against assigning costs to SEPTA.

Further, the Court affirmed the Commission's authority to assign responsibilities and allocate costs to the City despite the Municipalities Financial Recovery Act. The Court held that the City's financial condition is not controlling or determinative for purposes of allocating costs for

maintenance of the Lloyd Street crossing and that the Commission need not consider the City's or any other party's financial condition in allocating costs for maintenance of the Lloyd Street bridge.

The BTS as well as other Parties (excluding Amtrak and SEPTA) maintained that the Commission must follow the Commonwealth Court's Remand Order in this case, stating that the Commission has no power to deviate from the Order of the Commonwealth Court. (*See City of Philadelphia v. Pa. PUC*, 720 A.2d 845 (Pa. Commw. Ct. 1998), *alloc. Denied*, 560 Pa. 689, 742 A.2d 677 (1999)). The BTS pointed out that the Pennsylvania Supreme Court in *Haefele v. Davis*, 380 Pa. 94, 110 A.2d 233 (1955), set for the power of the lower court when a matter is remanded to it:

> A lower court is without power to modify, alter, amend, set aside or in any manner disturb or depart from the judgment of the reviewing court as to any matter decided on appeal . . . under any other rule, litigation would never cease, and finality and respect for orderly process of law would be overcome by chaos and contempt. 380 Pa. At 98, 110 A.2d at 235.

The BTS asserted that this rationale has been followed consistently by the Appellate Courts of the Commonwealth of Pennsylvania. (*See In Re Estate of Banes*, 479 Pa. 264, 388 A.2d 319 (1978); *Blymiller v. Ballanti*, 236 Pa. Super. 211, 344 A.2d 680 (1975); *Roskwitalski v. Reiss*, 338 Pa. Super. 85, 487 A.2d 864 (1985)). Moreover, continued the BTS, the Court of Appeals for the Third Circuit also follows this same rationale. (*See Cowgill v. Raymark Industries, Inc.*, 832 F.2d 798 (3rd Cir. 1987)). Additionally, the Court of Appeals for the Third Circuit has stated that pursuant to 28 U.S.C. § 1738, it must give preclusive effect to a state court decision if courts of that state would do so. (*Schroeder v. Acceleration Life Insurance Company of Pennsylvania*, 972 F.2d 41 (3rd Cir. 1992)).

Thus, reasoned the BTS, if this rule of law applies to the power of the trial court on a matter remanded by an Appellate Court, then it follows that the same rule applies to the power of an administrative agency on a matter remanded by an Appellate Court. That is to say, if the trial court cannot alter the Remand Order of an Appellate Court, neither can an administrative agency. The trial court or administrative agency must proceed on remand in a manner consistent with the opinion of the Appellate Court. (*Commonwealth v. Tick, Inc.*, 431 Pa. 420, 246 A.2d 424 (1968)).

Pursuant to the foregoing judicial precedent, we must follow the Commonwealth Court's Remand Order and consider all of the Parties, including Amtrak and SEPTA, in our allocation order in this case, without regard to their financial condition. However, we wish to emphasize that our observance of the Commonwealth Court mandate should not, in any way whatsoever, be construed to be disrespectful to the Third Circuit and its decisions. However, we believe that this judicial conflict must ultimately be resolved by a court of competent jurisdiction.

It is not the purpose of this Opinion and Order to decide the Amtrak/SEPTA exemption issue and which line of judicial authority will eventually be upheld. Instead, in this Opinion and Order we have attempted to:

(a) protect and promote the public safety by having maintenance performed on the Lloyd Street rail-highway crossing without further delay;

(b) observe the mandate of the Commonwealth Court Remand Order in this proceeding;

It bears repeating that arguments by Amtrak and SEPTA concerning the applicability of the federal exemptions and the Consent Decree are not controlling to the instant matter because we are bound to follow the direction of the Commonwealth Court on remand. (*Haefele v. Davis, supra.*). It is

clear that, under a traditional analysis, the railroads which either own the right-of-way under the bridge or operate on it would be allocated some portion of the cost and/or responsibility for maintaining a separated crossing. Thus, under the Remand Order, we had no choice but to consider Amtrak, SEPTA and the City for cost and work allocations, and to allocate some costs or responsibilities to each.

It is clear that this issue will continue to plague us until either the Pennsylvania or the United States Supreme Court has an opportunity to resolve this conflict issue. This conflict of law has so far not only created a procedural morass for counsel, but also has the potential to negatively affect the safety of rail highway crossings in the Southeastern quadrant of the Commonwealth. All Parties should be cognizant that we need a final resolution of this issue in order to allow us to pursue our paramount mission in this type of case which, as aforesaid, is the promotion of the safety of the travelling public by ensuring safe and well-maintained rail highway crossings in the Commonwealth.

Conclusion

We have carefully reviewed the record as developed in this proceeding, including the ALJ's Recommended Decision and the Exceptions and Reply Exceptions filed thereto. Premised upon our review, the Parties' Exceptions will be granted or denied consistent with this Opinion and Order. Accordingly, the ALJ's Recommended Decision will be adopted as modified by this Opinion and Order; THEREFORE,

IT IS ORDERED:

1. That the Exceptions filed by Norfolk Southern Railway Company on August 13, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby granted, in part, and denied, in part.

2. That the Exceptions filed by the Commission's Bureau of Transportation and Safety on August 14, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby granted.

3. That the Exceptions filed by the County of Delaware on August 15, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby denied.

4. That the Exceptions filed by the Pennsylvania Department of Transportation on August 16, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby denied.

5. That the Exceptions filed by the Southeastern Pennsylvania Transportation Authority on August 16, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby denied.

6. That the Exceptions filed by City of Chester on August 16, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby denied.

7. That the Exceptions filed by the National Railroad Passenger Corporation on August 17, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby denied.

8. That the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen herein, which was issued on August 7, 2001, is hereby adopted as modified by this Opinion and Order.

9. That the City of Chester, at its initial cost and expense, furnish all material and perform all work necessary

to maintain the substructure, superstructure and deck of the Lloyd Street rail-highway bridge crossing; all in a safe and satisfactory condition.

10. That the National Railroad Passenger Corporation, the Southeastern Pennsylvania Transportation Company, the Norfolk Southern Railway Company, the County of Delaware and the Pennsylvania Department of Transportation reimburse the City of Chester in an amount equal to 25% of the costs incurred by the City of Chester in maintaining the substructure, superstructure and deck of the bridge, exclusive of the wearing surface, curbs and sidewalks on the bridge, in the following proportions:

(a) National Railroad Passenger Corporation - 5%

(b) Southeastern Pennsylvania Transportation Authority - 5%

(c) Norfolk Southern Railway Company - 5%

(d) County of Delaware - 5%

(e) Pennsylvania Department of Transportation - 5%

11. That the City of Chester bear all of the remaining costs incurred in furnishing material and performing work in accordance with Ordering Paragraph 9 hereof.

12. That the City of Chester, at its sole cost and expense, furnish all material and perform all work necessary:

(a) to maintain the curbs and sidewalks and wearing surface on the bridge; and

(b) to maintain the highway approaches to the bridge, including the wearing surface and the curbs and sidewalks thereon; and

(c) to remove snow, ice and debris from all of the items listed in (a) and (b) above;

provided however that nothing contained herein shall prohibit the City of Chester or the County of Delaware from enforcing any applicable laws and/or ordinances pertaining thereto.

13. That the City of Chester, at its sole cost and expense, at least once every year following the date of the entry of the instant Opinion and Order, perform an in-depth inspection of the entire structure. The City is further directed to prepare and submit to the Commission's Bureau of Transportation and Safety and to all Parties to this proceeding a detailed in-depth inspection report. That report shall include, *inter alia*, a structural analysis of the bridge, its load-carrying capacity, what maintenance work the City of Chester has performed since the date of entry of the instant Opinion and Order, and any changes in the condition of the bridge which would affect the safety and well being of the travelling public. That report shall also include any specific recommendations as to what additional repairs and/or work should be performed and when such repairs and work will be done, together with the status of the City's efforts to secure funding for bridge replacement.

14. That the City of Chester, at least fifteen days prior to the start of each inspection and/or maintenance work, shall notify all Parties in interest of the actual date on which each such inspection and/or work shall begin.

15. That the National Passenger Railroad Corporation, at its initial cost and expense, provide watchmen and flagmen, if necessary, and any and all other protection necessary for all rail operations, including those of Norfolk Southern Railway Company, the National Passenger Railroad Corporation and the Southeastern Pennsylvania Transportation Authority, during performance of the maintenance and inspection work ordered in Ordering Paragraphs 9, 12 and 13 hereof.

16. That the Norfolk Southern Railway Company and the Southeastern Pennsylvania Transportation Authority reimburse the National Railroad Passenger Corporation in an amount equal to 55% of the costs incurred by the National Railroad Passenger Corporation in complying with Ordering Paragraph 15, in the following proportions:

(a) Norfolk Southern Railway Company - 10%

(b) Southeastern Pennsylvania Transportation Authority - 45%

17. That the National Railroad Passenger Corporation bear all of the remaining costs incurred in supplying materials and performing the work in accordance with Ordering Paragraph 15 hereof.

18. That in complying with the provisions of this Opinion and Order, all Parties cooperate and coordinate their respective duties, obligations and work with each other.

19. That the National Railroad Passenger Corporation, the Southeastern Pennsylvania Transportation Authority and the Norfolk Southern Railway Company, each respectively, at their respective sole cost and expense, furnish all material and perform all work necessary to maintain their respective facilities, property and attachments to the bridge, if any, at the crossing and the approaches thereto; all in a safe, satisfactory and fully operational condition.

20. That each non-carrier utility, at its respective sole cost and expense, furnish all material and perform all work necessary to maintain its respective facilities and property, if any, at the crossing and the approaches thereto; all in a safe and satisfactory condition.

21. That this Opinion and Order, insofar at it places costs on various parties in this proceeding, is without prejudice to the rights of such parties to recover said costs from others in accordance with any lawful agreements.

22. That this Opinion and Order is binding upon the Parties hereto, their respective successors and assigns.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: September 7, 2001

ORDER ENTERED: September 7, 2001

APPENDIX D

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held August 31, 2000

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman
Nora Mead Brownell
Aaron Wilson, Jr., Recusing
Terrance J. Fitzpatrick

I-00970070

Investigation upon the Commission's own motion to determine the conditions, disposition, and responsibility for maintenance of the existing crossing structure carrying Lloyd Street above-the-grade of the tracks of National Railroad Passenger Corporation in the City of Chester, Delaware County (AAR 540 958 N)

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition are the Exceptions filed by various Parties to the Recommended Decision of Administrative Law Judge (ALJ) Herbert Smolen, which was issued on March 14, 2000.[1]

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[1] The original due date for filing Exceptions was April 3, 2000. On March 29, 2000, counsel for the City of Chester requested a two (2) week extension of time in which to file Exceptions. That request was granted

Several Parties filed Exceptions to the Recommended Decision. Those Parties, and the date on which they filed, are as follows: (1) City of Chester (Chester), on April 14, 2000; (2) National Railroad Passenger Corporation (Amtrak), on April 14, 2000; (3) Consolidated Rail Corporation (Conrail), on April 17, 2000; (4) Pennsylvania Department of Transportation (PennDOT), on April 17, 2000; and (5) Delaware County (County), on April 17, 2000.

Additionally, the following Parties filed Reply Exceptions on the date indicated: (1) Chester, on April 20, 2000,[2] (2) Conrail, on April 27, 2000; and (3) PennDOT, on April 27, 2000.

History of the Proceeding

By Order entered on October 6, 1997, the Commission instituted an investigation upon its own motion to determine the condition, disposition, and responsibility for maintenance of the existing crossing structure carrying Lloyd Street above-the-grade of the tracks of Amtrak in Chester, Delaware County.

A prior Commission Order entered on May 29, 1997, at Docket No. M-00970921, affirmed the action of Chester in posting the Lloyd Street Bridge for a five (5) ton weight limit. Thereafter, a Field Conference was held on July 14, 1997, and, because no concerned party agreed to accept responsibility for maintaining the structure, the instant proceeding was instituted by the October 6, 1997 Order. That Order also directed that PennDOT, Chester, Delaware County,

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per Secretarial Letter dated April 6, 2000, by which all Parties hereto were granted until April 17, 2000, in which to file their Exceptions.

[2] In addition to its Reply Exceptions filed on April 20, 2000, Chester also filed another set of Reply Exceptions on April 27, 2000. The April 27 Reply Exceptions replied specifically to the arguments made in Amtrak's and Conrail's Exceptions.

Amtrak, Southeastern Pennsylvania Transportation Authority (SEPTA), Philadelphia Electric Company (PECO), Bell Atlantic-PA (BA-PA), Philadelphia Gas Works (PGW) and AT&T Communications be made Parties to this proceeding.

A hearing herein was held on April 28, 1998, wherein the BTS, Amtrak, SEPTA, and PennDOT presented testimony.

By Order dated May 22, 1998, the record was reopened directing Conrail be made a party to the proceeding and that Chester and the County be served with notice of any further hearing. An additional hearing was held on July 7, 1998, wherein testimony was received from Conrail and Amtrak. Chester was directed to serve all Parties with responses to the Commission's Questions and Procedures for review by the Parties with a view toward possible cross-examination.

On September 11, 1998, Conrail and PennDOT filed separate Motions to Strike the written direct testimony of Chester. Thereafter, a further hearing was scheduled in order to afford Chester an opportunity to present its testimony. That hearing was held on November 13, 1998, and Chester presented three (3) witnesses and two (2) Exhibits. In addition, Conrail introduced one (1) additional Exhibit. The record consists of 207 pages of transcript and various Exhibits. Briefs and Reply Briefs were filed.

The Recommended Decision of the ALJ was issued on March 14, 2000. Exceptions and Reply Exceptions were filed as above noted.

Discussion

In his Recommended Decision, ALJ Smolen made 86 Findings of Fact (R. D., pp. 3-13) and drew eight (8) Conclusions of Law (R. D., pp. 33-34). We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law to the extent that they are not expressly, or by necessary implication, overruled or modified by this Opinion and Order.

Initially, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. (*University of Pennsylvania v. Pennsylvania Public Utility Commission*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984)). Any Exception or argument that is not specifically addressed shall be deemed to have been duly considered and denied without further discussion.

Exceptions of the City of Chester

Chester filed two (2) Exceptions to the Recommended Decision herein, which will be considered jointly, since they are interrelated. The gist of Chester's arguments is that the Commission should refrain from allocating costs to Chester based on the City's status as a Financially Distressed Municipality.

We find that the Pennsylvania appellate courts have long held that evidence regarding an entity's financial inability to pay is irrelevant in Commission cost allocation proceedings, and should not be considered by the Commission. *East Rockhill Township v. Pa. PUC*, 540 A.2d 600 (Pa. Cmwlth. 1988). In the case of *Department of Highways v. Pa. PUC*, 190 Pa. Super. 1, 151 A.2d 850, the Superior Court made this statement regarding ability to pay as a factor in Commission cost allocations:

> We fail to see in the absence of some specific statutory provision authorizing such factor to be considered relevant or determinative, how the financial ability to pay, in a litigation such as here involved, would control or be determinative of the issue on allocation. Counsel for the Department has cited no authority to us for this position, and we have been unable to find such authority. Nor do we believe that the legislature contemplated that

> the Commission, in making allocation of costs, should enter into complicated questions of municipal taxation.

(151 A.2d 850,). We further find that the rationale behind this policy is clear. If the Commission were to be forced to consider inability to pay as a factor in allocating costs, it would become ensnared in deciding which municipality or other concerned entity is more financially able to bear costs. The Commission would be forced to evaluate each entity's budget and revenue in order to determine whether that entity is financially able to bear any cost in a rail-highway crossing project.

Clearly, in considering the issues attendant to this type of proceeding, our primary focus must be the prevention of accidents and the promotion of safety. Consideration of the issue of financial ability to pay could turn this type of litigation into a contest among the concerned parties as to which one is least able to pay for the work which all agree needs to be done.

Finally, as the Commonwealth Court noted in *Department of Transportation v. Pa. PUC*, 469 A.2d 1149 (Pa. Cmwlth. 1983), at Footnote 12, municipalities have sufficient revenue raising ability to offset any deficit created by Commission cost allocations. For all of the above reasons, Chester's Exceptions are denied.

Exceptions of Conrail

Conrail filed three (3) Exceptions to the Recommended Decision, which will be considered jointly, since they are interrelated.

Conrail objected to certain portions of the ALJ's Ordering Paragraphs 2, 7, and 9 (found on pages 34-35, 36, and 37 of the R.D.) which required that Conrail either perform work or bear expenses associated with the instant project. With regard to each of the specific instances cited in Ordering

Paragraphs 2, 7, and 9, Conrail argued that the allocation of the cost or the work to be performed by it, under the circumstances of this proceeding, would be contrary to law, would fail to comport with the requirement that the Commission render a decision which is "just and reasonable," and would contradict Commission precedent.

It is well settled that in rail-highway crossing cases, the guiding principal for Commission action is the public interest, i.e., to ensure and promote the protection, safety, convenience and welfare of the travelling public. To this end, the Commission has exclusive authority, under 66 Pa. C.S. §2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of rail-highway crossings, as well as the exclusive authority to determine and order which parties shall perform such work at the crossings and which parties shall maintain the crossings in the future. (*SEPTA v. Pa. P.U.C.*, 592 A.2d 797 (Pa. Cmwlth. 1991) *alloc. denied* 611 A.2d 714 (1992)).

Furthermore, the Commission is empowered, under 66 Pa. C.S. §2702(b), to determine and prescribe the manner in which such crossings may be constructed, reconstructed, altered, repaired, protected, suspended or abolished. The Commission is also empowered, pursuant to 66 Pa. C.S. §2702(c), to order the work performed upon such reasonable terms and conditions as it prescribes. (*Pennsylvania Game Commission v. Pa. P.U.C.*, 651 A.2d 596 (Pa. Cmwlth. 1994), *alloc. denied* 544 Pa. 649, 664 A.2d 977 (1995)). Additionally, the Commission, pursuant to 66 Pa. C.S. § 2704(a), has the exclusive authority to assess the costs of any work it orders upon the concerned parties in the proceeding in such proper proportions as the Commission may determine.

It is also within the purview of the Commission to determine which parties are concerned within the meaning of 66 Pa. C.S. §§2704(a) and 2702(c). (*County of Chester v. Pa. P.U.C.*, 408 A.2d 552 (Pa. Cmwlth. 1979)). Moreover, the

Commission's jurisdiction also extends to the approaches to rail-highway crossings. (*Department of Transportation v. Pa. P.U.C.*, 440 A.2d 657 (Pa. Cmwlth. 1982); *Springgettsbury v. Pa. P.U.C.*, 289 A.2d 762 (Pa. Cmwlth. 1972)).

Furthermore, in apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule, but takes all relevant factors into consideration; the only requirement being that its Order is just and reasonable. (*East Rockhill Twp. v. Pa. P.U.C.*, 540 A.2d 600 (Pa. Cmwlth. 1988); *Municipality of Monroeville v. Pa. P.U.C.*, 600 A.2d 655 (Pa. Cmwlth. 1991); *Greene Township v. Pa. P.U.C.*, 15 (Pa. Cmwlth. 1995) (*Green Township*); *Commonwealth Department of Transportation v. Pa. P.U.C.*, 464 A.2d 645 (Pa. Cmwlth. 1983). *See also Department of Transportation v. Pa. P.U.C.*, 21 Pa. Cmwlth. 576, 423 A.2d 1108 (1980)).

As aforesaid, the paramount consideration in proceedings of this nature is the promotion and enhancement of the safety of the public and the prevention of accidents. Inherent therein is the necessity to identify the contributing factors to unsafe conditions at rail-highway crossings and approaches thereto. Among the factors which the Commonwealth Court noted in the *Greene Township* case cited *supra*, as relevant are the following: (1) which party built the crossing; (2) whether a roadway existed before or after the construction of the crossing; (3) relative benefit conferred on each party with the construction of the crossing; (4) whether either party is responsible for the deterioration of the crossing which has lead to the need for its repair, replacement or removal; and (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing.

We note, however, that while the Commission has considered these factors to be relevant in the past, this in no way limits the factors that we can consider. (*Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth. 1996)). Based on our review of Conrail's Exceptions, we conclude

that, given the totality of the circumstances herein, the ALJ's recommended apportionment of work and costs to Conrail is just, reasonable, and in accord with the evidence. In this regard, we specifically note that Conrail, as well as Amtrak and SEPTA, benefit from a separated crossing. (Tr. 25, 35, 124, 135, 179). Specifically, we note that Conrail operates approximately four (4) freight trains per day at speeds up to forty-five (45) miles per hour (Tr. 13, 123) and, therefore, benefits from the separated crossing in being afforded an interrupted highway crossing and in avoidance of possible accidents and liability claims that could arise at a grade crossing. (Tr, p. 124).

Consistent with the foregoing discussion, Conrail's Exceptions are denied.

Exceptions of PennDOT

PennDOT filed two (2) Exceptions to the Recommended Decision, which will be considered jointly, since they are interrelated.

PennDOT objected to certain portions of the ALJ's Ordering Paragraphs Nos. 2 and 8 (found on pages 34-35 and 37 of the R.D.) which required that PennDOT bear a certain portion of the expenses associated with the instant project. With regard to each of the specific instances PennDOT cited in the relevant Ordering Paragraphs, PennDOT argued that the record does not contain substantial evidence to support the allocation of any portion of the costs to PennDOT. PennDOT argues, instead, that the cost responsibility herein should be borne by the City of Chester, Delaware County, and the rail carriers as the Parties which derive a direct and substantial benefit from the existence of the crossing.

We have outlined above the standards which we are statutorily mandated to consider in apportioning the work and the expense of rail-highway crossing cases. On review of

PennDOT's Exceptions, we conclude that, given the totality of the circumstances herein, the ALJ's recommended apportionment of costs to PennDOT is just, reasonable and appropriate. In this regard, we specifically note that PennDOT has, up until the present time, performed no work on the bridge, nor has it been assigned any maintenance responsibility relative to the subject bridge. (R.D., p. 27).

Accordingly, PennDOT's Exceptions are denied.

Exceptions of Amtrak

Amtrak filed seven (7) Exceptions to the Recommended Decision.

In its Exception No. 1, Amtrak objected to Finding of Fact No. 11 found on page 4 of the Recommended Decision, which provides as follows:

> 11. Amtrak has maintenance responsibilities for the rail line and facilities located at the subject crossing under its Agreement with Conrail (N.T. 127-128; Conrail Exhibit No. 1 at 5, §2.2(c)).

Amtrak argues that the statement of this finding must be revised to conform to the evidence. Amtrak quoted from Conrail Exhibit No. 1 at Section 2.2(c), which refers to Amtrak's agreement to maintain "NEC rail properties...in a condition that will permit operation of freight trains." Amtrak contends that this quote requires the revision of Finding of Fact No. 11 in order to delete its reference to "rail line and facilities located at the subject crossing" and to instead insert the quoted language from Conrail's exhibit.

We find that, while Amtrak correctly quotes Conrail Exhibit No. 1 in its Exception, it mischaracterizes the intent of the ALJ. The ALJ was merely applying the cited contractual provision to the facts in this case to correctly paraphrase the effect of the Agreement between Conrail and

Amtrak, in relation to Amtrak's maintenance responsibilities under that Agreement. Accordingly, Amtrak's Exception No. 1 is denied.

In its Exception No. 2, Amtrak objected to the ALJ's Finding of Fact No. 19, which, essentially, states that Amtrak benefits from the separation of rail and highway traffic by being able to operate its trains unimpeded knowing that motorists and pedestrians can pass safely overhead. (Tr. 14). Amtrak contends that this Finding is inconsistent with the testimony herein.

We find that, while Amtrak objects to the cited Finding of Fact, Amtrak does not deny that it benefits from the existence of the grade-separated structure. In fact, the relevant Finding is culled from the uncontradicted testimony of Amtrak's own witness. (R.D., p. 5; Testimony of Richard Cooper). Accordingly, there is no need to revise the relevant Finding, and Amtrak's Exception No. 2 is denied.

In its Exception No. 3, Amtrak objected to Finding of Fact No. 30, which states as follows: "The purpose of the protective shield is to protect anyone from touching the overhead electrical wires." (Tr, p. 117). Amtrak contends that this Finding should be rephrased in order to reflect the fact that the protective shield protects persons from coming into contact with electrical wires under the bridge, not overhead.

We find that the correction suggested by Amtrak to the relevant Finding of Fact is technical in nature and is, additionally, unnecessary to make at this time. The thrust of Finding of Fact No. 30 is an inherent safety issue, which is captured by the verbage used by the ALJ. Accordingly, Amtrak's Exception No. 3 is denied.

In its Exception No. 4, Amtrak objected to Finding of Fact No. 58, which states essentially that Amtrak would have to erect some type of support device for its catenary structure if

the bridge were removed. (Tr. 105). Amtrak contends that nothing in the evidentiary record supports this Finding.

We find that the relevant Finding is based upon a representation of counsel for Amtrak that forms part of the evidentiary record in this proceeding. (Tr., p. 105). Accordingly, there is an adequate basis in the record for this Finding, and Amtrak's Exception No. 4 is denied.

Amtrak's Exceptions Nos. 5 and 7 will be considered jointly, since they are interrelated. In those Exceptions, Amtrak contends that the ALJ employed inaccurate legal reasoning in his Recommended Decision on pages 21, and 23-25. Specifically, Amtrak argues that the ALJ failed to consider the binding legal precedent recently issued by the Pennsylvania Supreme Court in *City of Philadelphia v. Consolidated Rail Corporation*, 747 A.2d 352 (2000) (*City of Philadelphia*).

We find that the cited case of *City of Philadelphia* does not erode or question the long-established exclusive jurisdiction of the Commission over the apportionment of work and costs at rail-highway crossings, based upon the precedents that we have discussed above. The *City of Philadelphia* case, rather, simply stands as an opinion concerned with the ownership of a particular bridge, which bridge is not subject to the present litigation.

The *City of Philadelphia* case is a decision of the Pennsylvania Supreme Court based upon a certified question from the Court of Appeals of the District of Columbia regarding ownership of the 41st Street Bridge in the City of Philadelphia. (*City of Philadelphia*, 747 A.2d at 352). The correct characterization of the case is that it disposes of the ownership of a particular bridge according to common law principles. Nowhere in the opinion does the Supreme Court question the Commission's exclusive jurisdiction to allocate costs or maintenance responsibilities. Accordingly Amtrak's Exceptions Nos. 5 and 7 are denied.

Finally, in its Exception No. 6, Amtrak objects to the ALJ's lines 13-15 on page 30 of his Recommended Decision wherein the ALJ asserted that "were it not for the Amtrak and SEPTA situation, it would have been recommended that each of them reimburse the City of Chester for a portion of the bridge maintenance costs." By the "Amtrak and SEPTA situation," the ALJ referred to the Commission's inability, based on the current state of the law, to allocate costs or responsibilities to Amtrak and SEPTA. (*See* discussion found in the R.D., pp. 20-26). At the conclusion of that discussion, on pages 25-26 of the Recommended Decision, the ALJ noted that he recommended that the Commission, at this time, refrain from assessing maintenance duties and costs upon Amtrak and SEPTA. The ALJ further noted that he made this recommendation, despite the past and future benefits to Amtrak and SEPTA from the instant bridge, for the reasons he has outlined. Amtrak, in this Exception, contends that the cited lines from the Recommended Decision are "pure dicta," and that, since those lines only express what the ALJ might have done if the law were different, those lines should be deleted.

We find that, contrary to Amtrak's contention, the above-quoted lines are not dicta, but constitute the ALJ's rationale behind the ALJ's recommended cost allocations in this proceeding. Following the section which Amtrak seeks to delete, the ALJ noted as follows: "by reason of the Amtrak/SEPTA situation, as aforesaid, and the fact that Conrail, the County of Delaware and PennDOT also receive benefits from the existence of a grade separated crossing, it is recommended . . . that they should reimburse the City of Chester for maintaining the substructure, superstructure and deck of the bridge." (R.D., p. 30).

In other words, were it not for the current state of the law, the ALJ would have recommended that Amtrak and SEPTA reimburse Chester for a portion of the bridge maintenance

costs. The ALJ noted that he was constrained to recommend that one or all of the Parties to which costs were allocated were, by necessity, allocated a greater proportion of those costs than would have otherwise been the case. Indeed, one or more of those Parties may not have been allocated any costs had a portion of those costs been allocated to Amtrak or SEPTA. Accordingly, since the passage to which this Exception refers is not dicta, but an explanation of the basis for the ALJ's recommended cost allocation, Amtrak's Exception No. 6 is denied. All of Amtrak's Exceptions are denied.

Exceptions of the County

The County filed six (6) Exceptions to the Recommended Decision. In its Exception No. 1, the County attempted to introduce into the record purported evidence of the County's liquid fuel tax distribution to the City of Chester.

We note that the County chose not to participate in the hearings held herein. However, the County is now attempting to submit evidence into the record upon the Affidavit of its counsel without presentation of a sponsoring witness or the opportunity for the other Parties to cross-examine the witness. To allow such evidence at this juncture would be contrary to the provisions of Section 5.402(a) of our Regulations, 52 Pa. Code §5.402(a) (Section 402(a)). Accordingly, the County's Exception No. 1 is denied.

The County's Exceptions Nos. 2, 3, 4, and 6 will be considered jointly, since they are interrelated. In those Exceptions, the County argues that the benefit that enures to the City of Chester from the bridge is minimal.

We note that the County chose not to participate in the hearings herein. However, the County is, at this juncture, attempting to submit evidence into the record upon the Affidavit of its counsel without the presentation of a

sponsoring witness or the opportunity for other parties to cross-examine the witness. To permit the County to submit evidence in this manner would be contrary to the provisions of Section 5.402(a), *supra*. Accordingly, the County's Exceptions Nos. 2, 3, 4, and 6 are denied.[3]

The County, in Exception No. 5, attempted to introduce into the record purported evidence that "the City of Chester does not consider the bridge necessary and is currently considering closing it to vehicular and pedestrian traffic."

We find that, as pointed out by the ALJ herein, the City of Chester has determined that the bridge is necessary since it has taken steps to apply for funds to replace it. (R.D., p. 27, citing Tr., pp. 162-163, 169). The County's Exception No. 5 contradicts the evidence of Chester's witness as cited by ALJ Smolen. We find that Chester's action in taking steps to apply for funds to replace the bridge constitutes credible evidence that Chester does consider the bridge to be necessary. Additionally, Chester, in its own Exceptions, made no mention that it is considering closing the bridge. Accordingly, the County's Exception No. 5 is denied.

Conclusion

We have carefully reviewed the record as developed in this proceeding, including the ALJ's Recommended Decision and the Exceptions filed thereto. Premised on our review, we conclude that the Parties' Exceptions to the Recommended Decision are not meritorious, and, as a result, they will be

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[3] On April 27, 2000, Conrail filed a Motion to Strike Exhibit "A" to the Exceptions of the County, pursuant to Sections 5.103 and 5.402 of our Regulations, 52 Pa. Code §§ 5.103 and 5.402, based upon the fact that the County received notice of the proceedings herein, and chose not to participate. Based upon our ruling on the County's Exceptions, Conrail's Motion to Strike is, in essence, granted.

denied. Accordingly, the ALJ's Recommended Decision will be adopted as the action of the Commission; THEREFORE,

IT IS ORDERED:

1. That the Exceptions filed by the City of Chester, on April 14, 2000, to the Recommended Decision of Administrative Law Judge Herbert Smolen herein are denied, consistent with this Opinion and Order.

2. That the Exceptions filed by the National Railroad Passenger Corporation, on April 14, 2000, to the Recommended Decision of Administrative Law Judge Herbert Smolen herein are denied, consistent with this Opinion and Order.

3. That the Exceptions filed by Consolidated Rail Corporation, on April 17, 2000, to the Recommended Decision of Administrative Law Judge Herbert Smolen herein are denied, consistent with this Opinion and Order.

4. That the Exceptions filed by the Pennsylvania Department of Transportation, on April 17, 2000, to the Recommended Decision of Administrative Law Judge Herbert Smolen herein are denied, consistent with this Opinion and Order.

5. That the Exceptions filed by the County of Delaware, on April 17, 2000, to the Recommended Decision of Administrative Law Judge Herbert Smolen herein are denied, consistent with this Opinion and Order.

6. That the Recommended Decision of Administrative Law Judge Herbert Smolen issued herein on March 14, 2000, is hereby adopted as the action of the Commission, consistent with this Opinion and Order.

7. That the City of Chester, at its initial cost and expense, furnish all material and perform all work necessary to maintain the substructure, superstructure and deck of the Lloyd Street rail-highway bridge crossing; all in a safe and satisfactory condition.

8. That the Consolidated Rail Corporation, the County of Delaware, and the Pennsylvania Department of Transportation shall reimburse the City of Chester in an amount equal to twenty-five percent (25%) of the costs incurred by the City of Chester in maintaining the substructure, superstructure, and deck of the bridge, exclusive of the wearing surface, curbs, and sidewalks on the bridge, in the following proportions:

(a) Consolidated Rail Corporation - 15%

(b) The County of Delaware - 5%

(c) Pennsylvania Department of Transportation - 5%

9. That the City of Chester bear all of the remaining costs incurred in furnishing material and performing work in accordance with Ordering Paragraph No. 7 hereof.

10. That the City of Chester, at its sole cost and expense, furnish all material and perform all work necessary:

(a) to maintain the curbs and sidewalks and wearing surface of the bridge;

(b) to maintain the highway approaches to the bridge, including the wearing surface and the curbs and sidewalks thereon; and

(c) to remove snow, ice and debris from all of the areas listed in (a) and (b) above provided, however, that nothing contained herein shall prohibit the City of Chester or the County of Delaware from enforcing any applicable laws and/or ordinances pertaining thereto.

11. That the City of Chester, at its sole costs and expense, within 120 days from the date of entry of this Opinion and Order, perform an in-depth inspection of the entire structure and prepare and submit to our Bureau of Transportation and Safety, and to all Parties hereto, a detailed in-depth inspection report which shall include, *inter alia*, a structural analysis of the bridge, its load-carrying capacity, what maintenance work the City of Chester has performed since the date of entry of the instant Opinion and Order, any changes in the condition of the bridge, which would affect the safety and well being of the travelling public, any specific recommendations as to what additional repairs and/or work should be performed and when same will be done, together with the status of its efforts to secure funding for bridge replacement. In addition to the foregoing, the City of Chester, at its sole cost and expense, shall perform an in-depth inspection of the structure at least once every year thereafter and shall submit to the Com-mission and the Parties a detailed in-depth inspection report setting forth therein the foregoing items of information.

12. That the City of Chester, at least fifteen (15) days prior to the start of each inspection and/or maintenance work, shall notify all interested Parties of the actual date on which each such inspection and/or work shall begin.

13. That the Consolidated Rail Corporation, at its initial cost and expense, provide watchmen and flagmen, if necessary, and any and all other protection necessary for all rail operations, including those of Conrail, Amtrak, and SEPTA, during performance of the maintenance and inspection work ordered in Ordering Paragraphs 7, 10, and 11 hereof.

14. That the City of Chester, the County of Delaware, and the Pennsylvania Department of Transportation shall reimburse the Consolidated Rail Corporation for 85% of the costs incurred by Conrail in complying with Ordering Paragraph 13, in the following proportions:

(a) City of Chester - 75%

(b) The County of Delaware - 5%

(c) Pennsylvania Department of Transportation - 5%

15. That the Consolidated Rail Corporation bear all of the remaining costs incurred in supplying materials and performing work in accordance with Ordering Paragraph No. 13 hereof.

16. That in complying with the provisions of this Opinion and Order, all Parties shall cooperate and coordinate their respective duties.

17. That the National Railroad Passenger Corporation, the Southeastern Pennsylvania Transportation Authority, and the Consolidated Rail Corporation, each respectively, at their respective sole cost and expense, furnish all material and perform all work necessary to maintain their facilities, property and attachments to the bridge, if any, at the crossing, and the approaches thereto; all in a safe, satisfactory, and fully operational condition.

18. That each non-carrier utility, at their respective sole cost and expense, furnish all material and perform all work necessary to maintain their respective facilities and property, if any, at the crossing and the approaches thereto; all in a safe and satisfactory condition.

19. That this Opinion and Order, insofar as it places costs on various Parties in this proceeding, is without prejudice to the rights of such Parties to recover said costs from others in accordance with any lawful agreements.

20. That this Opinion and Order is binding upon the Parties hereto, their respective successors and assigns.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: August 31, 2000

ORDER ENTERED: September 1, 2000

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed Jan. 18, 1996]

CIVIL ACTION No. 95-CV-4500

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, 1234 Market Street Philadelphia, PA 19107
Plaintiff,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. Box 3265 North Office Building Harrisburg, PA 17120
Defendant.

CONSENT DECREE

WHEREAS, this action was initiated by plaintiff, Southeastern Pennsylvania Transportation Authority ("SEPTA") because of the failure of the defendant, the Pennsylvania Public Utility Commission ("the Commission") to apply SEPTA's exemption under 49 U.S.C. §§ 24301(1) and 24501 (g), from Commission orders to inspect and maintain highway bridges over SEPTA rail lines, to the Woodland Avenue Bridge near 47th Street in Philadelphia in a PUC proceeding involving that bridge, at Commission docket I-870064; and

WHEREAS, the Commission has not acted to initiate or reopen proceedings involving other highway bridges over SEPTA railroad lines in order to reassign to other parties what appears to have been, prior to the enactment of the above-referenced statutory exemption, SEPTA's inspection and maintenance responsibilities f or such bridges (or parts thereof); and

WHEREAS, SEPTA has a continuing program of annual inspections of all structures, including all Highway Bridges (as that term is hereafter defined), over its railroad rights-of-way, and such inspections include visual inspections of the surface the Highway Bridges; and

WHEREAS, none of the Highway Bridges (as that term is hereafter defined) is the subject of any on-going design, construction or reconstruction which might be affected by this Consent Decree; and

WHEREAS, SEPTA does not now perform snow and ice removal from the surface of any Highway Bridge (as that term is hereafter defined), and is not required by any Commission order to do so, and any snow and ice removal from the Highway Bridges is performed by other entities, and such practice will not be affected by this Consent Decree; and

WHEREAS, the Commission recognizes and accepts SEPTA's statutory exemption from the future costs and responsibility associated with the design, construction, reconstruction, inspection, maintenance, snow, ice, debris or graffiti removal or repair of all highway bridges over railroad rights-of-way owned or operated upon by SEPTA ("Highway Bridges"), at railroad/highway crossings over which the PUC now has or may have jurisdiction; and

WHEREAS the Commission has procedures available for addressing emergencies, set forth at 52 Pa. Code sections 3.1 through 3.11, which in practice permit the Commission's issuance of an emergency (ex parte) order in any appropriate circumstances and as soon as practical, by a written order, requiring any entity under its jurisdiction, to perform or refrain from performing any action in order to fully remediate a clear and present danger to the public; and

WHEREAS, the Commission at all railroad/highway crossings under its jurisdiction, has jurisdiction over not only any railroad(s) but also any state or municipal entities

responsible for the highway(s) at and in the immediate vicinity of the crossings, including crossings where a Highway Bridge (as that term is subsequently defined in this Consent Decree) is located, and in an emergency, the Commission has the power to issue an emergency order requiring any parties under its jurisdiction to take any action (s) or forebear from any action(s) as necessary to remediate a clear and present danger.

NOW, THEREFORE, the Commission and SEPTA, intending to be legally bound, stipulate and agree as follows:

1. Under 49 U.S.C. §§24301(1) and 24501(g), the Commission is barred hereafter from assessing or continuing to assess upon SEPTA the cost or responsibility of or for design, construction, reconstruction, inspection, maintenance, removal of snow, ice, debris or graffiti, or repair ("Assessed Cost or Responsibility") of any Highway Bridge (further defined for this Consent Decree to also include all components, including without limitation, approaches, substructures and superstructures, highway decking, as well as railings, walls, fences and shielding of any kind, and stairways and ramps attached to the bridge (except where expressly accepted by SEPTA, either in writing to the Commission or on the record of a Commission proceeding, as a necessary part of an adjacent SEPTA-owned railroad station), and all lighting, drainage and highway signage). The term "Highway Bridge" shall not include any railroad catenary attachment on a Highway Bridge, and shall not include any railroad facilities beneath a Highway Bridge.

2. SEPTA is relieved by the above-referenced federal law from any further obligations under all prior orders of the Commission (which is defined to also include its predecessor, the Pennsylvania Public Service Commission) assigning to SEPTA any Assessed Cost or Responsibility for any Highways Bridges at any above-grade crossings under the Commission's jurisdiction.

3. Unless permitted by subsequent amendment to, or repeal of, the above referenced federal law, henceforth in all PUC above-grade crossing proceedings involving SEPTA railroad operations or SEPTA railroad rights-of-way, whether such proceedings are initiated by the Commission, SEPTA or by any other party, the Commission shall not assign to SEPTA, either on a temporary or on a permanent basis, any Assessed Cost or Responsibility in violation of SEPTA's statutory exemption with respect to Highway Bridges as set forth in paragraph no. 1 of this Consent Decree.

4. The Commission shall initiate or reopen proceedings regarding any above-grade crossing under its jurisdiction where, under the most recent relevant Commission order, SEPTA or a predecessor to SEPTA's title to the railroad right-of-way was made permanently responsible for the inspection and/or maintenance of any Highway Bridge or any portion thereof at such crossing, and the purpose of such PUC proceedings shall be, or shall include, the reassignment of SEPTA's prior Assessed Cost or Responsibility for such Highway Bridge to a party or parties other than SEPTA, as the Commission may determine.

5. The Commission and SEPTA acknowledge that the Commission's records of all railroad/highway crossings under its jurisdiction do not include a reference list describing all crossings where SEPTA has been assigned any Assessed Cost or Responsibility for Highway Bridges. In order to assist the Commission to begin its process of reassigning each such Assessed Cost or Responsibility to other parties, SEPTA has provided to the Commission a full and complete copy of SEPTA's 1995 bridge list.

6. The Bridge List's coded references as to which party or parties has been assigned maintenance responsibilities for each particular bridge are not necessarily accurate or complete, and SEPTA and the Commission agree that the dispositive document, in regard to the identity of Highway

Bridges or the current obligations of parties with respect to any Highway Bridge, is the most recent relevant Commission order. The Commission shall review its own records to determine what specific Assessed Cost or Responsibility had previously been assigned to SEPTA for any Highway Bridge, and pursuant to paragraphs nos. 1-3 above, must be reassigned by the Commission to other parties.

7. The Bridge List and its codes and a preliminary review by the Commission of its records identify the following Highway Bridges as bridges now in need of Commission action either to reassign SEPTA's Assessed Costs and Responsibilities or to assign maintenance responsibilities (where Commission records do not indicate which party or parties bear current maintenance responsibilities):

Bridge	SEPTA Railroad Right-of-Way	Bridge List Page
Union Avenue	SEPTA Mainline	6
Church Road	SEPTA Mainline	6
Greenwood Avenue	SEPTA Mainline	6
Bridge Street	Lansdale	8
Old York Road	Neshaminy (W. Trenton)	16
Old Street Road	Neshaminy (W. Trenton)	17
Wissahickon Avenue	Chestnut Hill West	28
School Lane	Chestnut Hill West	28
Allen Lane	Chestnut Hill West	29
City Avenue	Ivy Ridge	31
Woodland Avenue (near 47th Streeet)	Media-West Chester	33
Providence Road	Media-West Chester	36
Indian Lane	Media-West Chester	36
Eachus Road/Twp. 603	Media-West Chester	39
TR 153 / SR 4013	Bethlehem	46
Rockhill Road	Bethlehem	46
Sterling Street	Newtown	50
South Union Street	Octoraro	57
Sunnyside Road	Octoraro	58

8. Within sixty (60) calendar days after the Court approves this Consent Decree, the Commission shall take all action necessary to initiate Commission proceedings for each of the bridges identified in paragraph 7, either to reassign SEPTA's Assessed Costs and Responsibilities to parties other than SEPTA, or where Commission records do not indicate which party or parties bear current maintenance responsibilities, to assign such responsibilities to parties other than SEPTA. As part of its initial action within sixty (60) calendar days after the Court approves this Consent Decree, the Commission shall reassign (or assign) SEPTA's Assessed Costs and Responsibilities to parties other than SEPTA on at least a temporary basis.

9. As soon as possible thereafter, the Commission shall enter orders permanently reassigning SEPTA's Assessed Costs and Responsibilities, or (where Commission records do not indicate which party or parties bear current maintenance responsibilities) permanently assigning such responsibilities for each Highway Bridge listed in paragraph 7, to a party or parties other than SEPTA. Such orders shall be consistent with the scope of SEPTA's statutory exemption from taxes and fees, as referred to in paragraphs nos. 1-3 of this Consent Decree. The Commission's obligations to proceed under the schedule set forth in paragraph 8 do not apply to the Rockhill road bridge which is currently closed to all traffic, both motor vehicle and pedestrian, by barricades erected and maintained by the Township of East Rockhill, pending reconstruction of the bridge. The existing bridge (including its reconstruction) is the subject of a current Commission proceeding assigned to a Commission administrative law judge. If within one year of the approval of the Consent Decree the existing bridge has not been removed and the administrative law judge has issued no recommended decision reassigning SEPTA's Assessed Cost or Responsibility for (the maintenance of) the existing bridge to a party or parties other than SEPTA, the commission shall immediately act to reassign such bridge

maintenance responsibilities to a party or parties other than SEPTA, at least on an interim basis. If prior to the removal of the bridge, SEPTA, through its annual inspection or otherwise, learns of any problem with the Rockhill Road bridge that presents a clear and present danger, SEPTA shall notify the Commission, and the Commission, upon learning such information from SEPTA or from any other source, shall act under its emergency procedures or otherwise, immediately to order a party or party other than SEPTA to immediately remediate the problem with the bridge, by removal or otherwise, consistent with the terms of paragraph 11 below, as those terms relate to both the Commission and SEPTA.

10. If it is brought to the attention of the Commission by SEPTA (by notice under paragraph no. 13 below) or by any other source of information that SEPTA may have also been assigned any Assessed Costs and Responsibilities for any other Highway Bridges under the Commission's jurisdiction in addition to the Highway Bridges identified in this Consent Decree, the Commission shall (a) immediately notify SEPTA as provided in paragraph no. 13 below, and (b) within sixty (60) calendar days take all actions necessary to reassign such Assessed Costs and Responsibilities at least on a temporary basis, and shall promptly thereafter proceed to make a permanent reassignment of such Costs and Responsibilities.

11. In the interval between the Court's approval of this Consent Decree and the Commission's assignment(s) of temporary maintenance responsibility as required by paragraph no. 8 of this Consent Decree (hereinafter, "the interval"), SEPTA shall continue its pattern of annual inspections of all structures over its rights-of-ways, including the Highway Bridges referenced in paragraph no. 7 of this Consent Decree, and such inspections shall also include a visual inspection of the surface of such Highway Bridges (i.e., both the cartway and any footway on each Bridge). In the interval, if SEPTA learns, either through any of its

continuing annual inspections or from any other source that a condition develops involving any part(s) of these Highway Bridges that presents a clear and present danger to the public (either those using the Highway Bridge or the railroad beneath), SEPTA shall immediately contact the Commission and request that the Commission, using its emergency procedures or otherwise, immediately assign an entity under its jurisdiction (at the site of the Highway Bridge) with the duty to take such action(s) as to remediate the danger, including erecting barricades and signage, and/or making repairs (and such other action as the Commission shall determine), involving the Highway Bridge. If in the interval the Commission learns, either through a communication from SEPTA or from any other source, that a condition has developed with any part(s) of these Highway Bridges that presents a clear and present danger to the public (either those using the Highway Bridge or the railroad beneath), the Commission shall immediately act, either through its emergency procedures or otherwise, to require a party or party (other than SEPTA) under its jurisdiction at the site of the Highway Bridge, to take any necessary actions to remediate the danger, such as erection of barricades, signage, and repairs (and/or such other actions as the Commission may require) to and at the site of the Highway Bridge. To whatever extent necessary, SEPTA shall cooperate by allowing reasonable access to its railroad right-of-way in order that any such repairs can be carried out. If, by the nature of the work involved in the repair, the work of the repair (or any work or other action related to the repair), must be carried out by SEPTA, the Commission shall require SEPTA to do such work or other action, and direct that SEPTA's costs and expenses shall be subsequently reimbursed to SEPTA by another (or other) party(ies), as the Commission then or thereafter shall determine.

12. SEPTA shall cooperate with the Commission during all proceedings initiated by the Commission under this Consent

Order, by providing to the Commission any relevant information SEPTA may have concerning the crossings involved in the proceedings.

13. All notices required between the Commission and SEPTA under the terms of this Consent Decree shall be by certified U.S. mail, return receipt requested, to the following:

Public Utility Commission:

Chief Counsel
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

SEPTA:

both of two:

General Counsel,
SEPTA
1234 Market Street
Fifth Floor
Philadelphia, PA 19107

and:

Chief Engineer,
SEPTA
1234 Market Street
13th Floor
Philadelphia, PA 19107

The notice requirements established by this Consent Decree shall not replace, but shall supplement, any notice procedures of the Commission in regards to all Commission procedures initiated by the Commission (or any other party) as a result of Commission compliance (or, when initiated by any other party, which provides the Commission with an opportunity to comply) with this Consent Decree.

14. The Commission and SEPTA agree that they will jointly submit this Consent Decree to the United States District Court for the Eastern District of Pennsylvania for approval. If the Court approves the Consent Decree, it shall operate as an Order of the Court. If the Court does not approve the Consent Decree, the Consent Decree will be null and void, and the litigation will proceed.

15. This Court shall retain jurisdiction over this action to enforce the provisions of this Consent Decree, including any claims of SEPTA arising out of the Commission's failure to comply with SEPTA's federal statutory exemption. Notwithstanding paragraph 16 below, SEPTA reserves the right to seek attorney fees and costs, and any other appropriate remedies in the event of any action by SEPTA to enforce the provisions of this Consent Decree.

16. SEPTA covenants and agrees that it shall not seek to recover its attorney fees and costs in this action, in regards to fees and costs leading up to and including this Consent Decree. The PUC covenants and agrees that it will not oppose SEPTA's withdrawal of a certain Petition for Review filed on July 21, 1995 by SEPTA at the Pennsylvania Commonwealth Court (at Docket No. 1845 C.D. 1995). The PUC further covenants and agrees not to seek attorney fees and costs in regards to such SEPTA petition and SEPTA's withdrawal of such Petition. SEPTA shall withdraw such Petition for Review within ten (10) business days of the Court's approval of the Consent Decree.

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JAN E. DUBOIS
Honorable Jan E. DuBois, J.
1/19/96

APPENDIX F

UNITED STATES CODE SERVICE

TITLE 49. TRANSPORTATION
SUBTITLE V. RAIL PROGRAMS
PART C. PASSENGER TRANSPORTATION
CHAPTER 243. AMTRAK

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49 USCS § 24301 (2001)

§ 24301. Status and applicable laws

(a) Status. Amtrak—

(1) is a railroad carrier under section 20102(2) and chapters 261 and 281 of this title [49 USCS §§ 26101 *et seq.* and 28101 *et seq.*];

(2) shall be operated and managed as a for-profit corporation; and

(3) is not a department, agency, or instrumentality of the United States Government, and shall not be subject to title 31.

(b) Principal office and place of business. The principal office and place of business of Amtrak are in the District of Columbia. Amtrak is qualified to do business in each State in which Amtrak carries out an activity authorized under this part [49 USCS §§ 24101 *et seq.*]. Amtrak shall accept service of process by certified mail addressed to the secretary of Amtrak at its principal office and place of business. Amtrak is a citizen only of the District of Columbia when deciding original jurisdiction of the district courts of the United States in a civil action.

(c) Application of Subtitle IV. Subtitle IV of this title [49 USCS §§ 10101 *et seq.*] shall not apply to Amtrak, except for sections 11301, 11322(a), 11502, and 11706. Notwithstand-

ing the preceding sentence, Amtrak shall continue to be considered an employer under the Railroad Retirement Act of 1974, the Railroad Unemployment Insurance Act, and the Railroad Retirement Tax Act.

(d) Application of safety and employee relations laws and regulations. Laws and regulations governing safety, employee representation for collective bargaining purposes, the handling of disputes between carriers and employees, employee retirement, annuity, and unemployment systems, and other dealings with employees that apply to a rail carrier subject to part A of subtitle IV of this title [49 USCS §§ 10101 *et seq.*] apply to Amtrak.

(e) Application of certain additional laws. Section 552 of title 5, this part [49 USCS §§ 24101 *et seq.*], and, to the extent consistent with this part [49 USCS §§ 24101 *et seq.*], the District of Columbia Business Corporation Act (D.C. Code § 29-301 *et seq.*) apply to Amtrak. Section 552 of title 5, United States Code, applies to Amtrak for any fiscal year in which Amtrak receives a Federal subsidy.

(f) Tax exemption for certain commuter authorities. A commuter authority that was eligible to make a contract with Amtrak Commuter to provide commuter rail passenger transportation but which decided to provide its own rail passenger transportation beginning January 1, 1983, is exempt, effective October 1, 1981, from paying a tax or fee to the same extent Amtrak is exempt.

(g) Nonapplication of rate, route, and service laws. A State or other law related to rates, routes, or service does not apply to Amtrak in connection with rail passenger transportation.

(h) Nonapplication of pay period laws. A State or local law related to pay periods or days for payment of employees does not apply to Amtrak. Except when otherwise provided under a collective bargaining agreement, an employee of Amtrak shall be paid at least as frequently as the employee was paid on October 1, 1979.

(i) Preemption related to employee work requirements. A State may not adopt or continue in force a law, rule, regulation, order, or standard requiring Amtrak to employ a specified number of individuals to perform a particular task, function, or operation.

(j) Nonapplication of laws on joint use or operation of facilities and equipment. Prohibitions of law applicable to an agreement for the joint use or operation of facilities and equipment necessary to provide quick and efficient rail passenger transportation do not apply to a person making an agreement with Amtrak to the extent necessary to allow the person to make and carry out obligations under the agreement.

(k) Exemption from additional taxes.

(1) In this subsection—

(A) "additional tax" means a tax or fee—

(i) on the acquisition, improvement, ownership, or operation of personal property by Amtrak; and

(ii) on real property, except a tax or fee on the acquisition of real property or on the value of real property not attributable to improvements made, or the operation of those improvements, by Amtrak.

(B) "Amtrak" includes a rail carrier subsidiary of Amtrak and a lessor or lessee of Amtrak or one of its rail carrier subsidiaries.

(2) Amtrak is not required to pay an additional tax because of an expenditure to acquire or improve real property, equipment, a facility, or right-of-way material or structures used in providing rail passenger transportation, even if that use is indirect.

(l) Exemption from taxes levied after September 30, 1981.

(1) In general. Amtrak, a rail carrier subsidiary of Amtrak, and any passenger or other customer of Amtrak or

such subsidiary, are exempt from a tax, fee, head charge, or other charge, imposed or levied by a State, political subdivision, or local taxing authority on Amtrak, a rail carrier subsidiary of Amtrak, or on persons traveling in intercity rail passenger transportation or on mail or express transportation provided by Amtrak or such a subsidiary, or on the carriage of such persons, mail, or express, or on the sale of any such transportation, or on the gross receipts derived therefrom after September 30, 1981. In the case of a tax or fee that Amtrak was required to pay as of September 10, 1982, Amtrak is not exempt from such tax or fee if it was assessed before April 1, 1997.

(2) The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak.

(m) Waste disposal.

(1) An intercity rail passenger car manufactured after October 14, 1990, shall be built to provide for the discharge of human waste only at a servicing facility. Amtrak shall retrofit each of its intercity rail passenger cars that was manufactured after May 1, 1971, and before October 15, 1990, with a human waste disposal system that provides for the discharge of human waste only at a servicing facility. Subject to appropriations—

(A) the retrofit program shall be completed not later than October 15, 2001; and

(B) a car that does not provide for the discharge of human waste only at a servicing facility shall be removed from service after that date.

(2) Section 361 of the Public Health Service Act (42 U.S.C. 264) and other laws of the United States, States, and local governments do not apply to waste disposal from

rail carrier vehicles operated in intercity rail passenger transportation. The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this paragraph and may grant equitable or declaratory relief requested by Amtrak.

(n) Rail transportation treated equally. When authorizing transportation in the continental United States for an officer, employee, or member of the uniformed services of a department, agency, or instrumentality of the Government, the head of that department, agency, or instrumentality shall consider rail transportation (including transportation by extra-fare trains) the same as transportation by another authorized mode. The Administrator of General Services shall include Amtrak in the contract air program of the Administrator in markets in which transportation provided by Amtrak is competitive with other carriers on fares and total trip times.

HISTORY: (July 5, 1994, P.L. 103-272, § 1(e), 108 Stat. 904; Dec. 29, 1995, P.L. 104-88, Title III, Subtitle A, § 308(g), 109 Stat. 947; Dec. 2, 1997, P.L. 105-134, Title I, Subtitle A, §§ 106(b), 110(a), Title II, § 208, Title IV, §§ 401, 402, 415(d), 111 Stat. 2573, 2574, 2584, 2585, 2590.)

PENNSYLVANIA STATUTES

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 66. PUBLIC UTILITIES
PART I. PUBLIC UTILITY CODE
SUBPART D. SPECIAL PROVISIONS RELATING TO REGULATION OF PUBLIC UTILITIES
CHAPTER 27. RAILROADS

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66 Pa.C.S. § 2702 (2001)

§ 2702. Construction, relocation, suspension and abolition of crossings

(A) GENERAL RULE.—No public utility, engaged in the transportation of passengers or property, shall, without prior order of the commission, construct its facilities across the facilities of any other such public utility or across any highway at grade or above or below grade, or at the same or different levels; and no highway, without like order, shall be so constructed across the facilities of any such public utility, and, without like order, no such crossing heretofore or hereafter constructed shall be altered, relocated, suspended or abolished.

(B) ACQUISITION OF PROPERTY AND REGULATION OF CROSSING.—The commission is hereby vested with exclusive power to appropriate property for any such crossing, except as to such property as has been or may hereafter be condemned by the Department of Transportation for projects financed entirely by the Commonwealth and for Federal Aid Projects under section 1004 of the act of June 1, 1945 (P.L. 1242, No. 428), known as the "State Highway Law," in which case the provisions of that statute shall be in effect, and to determine and prescribe, by regulation or order, the points at which, and the manner in which, such crossing

may be constructed, altered, relocated, suspended or abolished, and the manner and conditions in or under which such crossings shall be maintained, operated, and protected to effectuate the prevention of accidents and the promotion of the safety of the public. The commission shall require every railroad the right-of-way of which crosses a public highway at grade to cut or otherwise control the growth of brush and weeds upon property owned by the railroad within 200 feet of such crossing on both sides and in both directions so as to insure proper visibility by motorists.

(C) MANDATORY RELOCATION, ALTERATION, SUSPENSION OR ABOLITION.—Upon its own motion or upon complaint, the commission shall have exclusive power after hearing, upon notice to all parties in interest, including the owners of adjacent property, to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be suspended or abolished upon such reasonable terms and conditions as shall be prescribed by the commission. In determining the plans and specifications for any such crossing, the commission may lay out, establish, and open such new highways as, in its opinion, may be necessary to connect such crossing with any existing highway, or make such crossing more available to public use; and may abandon or vacate such highways or portions of highways as, in the opinion of the commission, may be rendered unnecessary for public use by the construction, relocation, or abandonment of any of such crossings. The commission may order the work of construction, relocation, alteration, protection, suspension or abolition of any crossing aforesaid to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth or an established nonprofit organization with a recreational or conservation purpose.

(D) PROCEDURE FOR APPROPRIATION OF PROPERTY.—When any real property is appropriated by the commission under this section, each parcel of such property so appropriated, shall be accurately described by metes and bounds, and the record owner of each such parcel shall be named in the order of appropriation. Unless otherwise recorded, the commission shall file with the recorder of deeds of the proper county, a copy of that portion of the order of the commission which appropriates such property, and such plans and other detailed information as the commission may deem necessary. Such portion of the commission's order dealing with the specific property appropriated shall be recorded and indexed under the name or names of the record owners of such specific property at the expense of the utility or utilities, political subdivision, municipality or municipalities, governmental agency, including the Department of Transportation and Public Utility Commission, corporation or persons upon whose instigation, petition or complaint the said crossing was constructed, reconstructed, relocated, altered, suspended or abolished, as may be ordered, to bear such expense or recording by the commission. When such appropriation of real property has been recorded under the provisions of any other statute, such recording shall not be duplicated under the terms of this subsection.

(E) REACTIVATION.—The commission may, within its discretion upon petition by any railroad, the Commonwealth, a political subdivision or any other affected party by order reactivate any crossing suspended under this section.

(F) DANGER TO SAFETY.—Upon the commission's finding of an immediate danger to the safety and welfare of the public at any such crossing, the commission shall order the crossing to be immediately altered, improved, or suspended. Thereafter hearing shall be held and costs shall be allocated in the manner prescribed in this part.

(G) SUSPENSIONS.—Any order of suspension under this section shall require the following for the protection of the motoring public:

(1) Removal or covering of crossing warning devices.

(2)(i) Paving over the tracks; or

(ii) removal of the tracks and paving over of the area formerly occupied by said tracks; or

(iii) barricading the crossing.

(H) ASSIGNMENT OF CROSSING RESPONSIBILITIES TO CERTAIN NONPROFIT ORGANIZATIONS.—

(1) The commission may order the work of abolition of any crossing in whole or in part, including any future obligations, to be performed by a municipal authority created to advance recreation or conservation purposes or a nonprofit organization with a recreation or conservation purpose if:

(i) the municipal authority or nonprofit organization provides adequate security for the work or demonstrates financial responsibility to the satisfaction of the commission; and

(ii) the commission does not order any Commonwealth agency to bear ancillary responsibility for the work of abolition of any crossing, or the cost associated with the work, without the prior written consent of the head of the Commonwealth agency.

(2) In accordance with the provisions of section 2704 (relating to compensation for damages occasioned by construction, relocation or abolition of crossings), the commission may order the municipal authority or nonprofit organization assuming responsibility for the abolition of the crossing to bear all or a portion of the costs associated with the work. This section shall not apply to any proceeding wherein the commission has issued a final order prior to the effective date of its enactment.

PENNSYLVANIA STATUTES

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 66. PUBLIC UTILITIES
PART I. PUBLIC UTILITY CODE
SUBPART D. SPECIAL PROVISIONS RELATING TO REGULATION OF PUBLIC UTILITIES
CHAPTER 27. RAILROADS

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66 Pa.C.S. § 2704 (2001)

§ 2704. Compensation for damages occasioned by construction, relocation or abolition of crossings

(A) GENERAL RULE.—The compensation for damages which the owners of adjacent property taken, injured, or destroyed may sustain in the construction, relocation, alteration, protection, or abolition of any crossing under the provisions of this part, shall, after due notice and hearing, be ascertained and determined by the commission. Such compensation, as well as the cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid, as provided in this section, by the public utilities, municipal corporations, municipal authority or nonprofit organization authorized under section 2702(h) (relating to construction, relocation, suspension and abolition of crossings) concerned, or by the Commonwealth, in such proper proportions as the commission may, after due notice and hearing, determine, unless such proportions are mutually agreed upon and paid by the interested parties.

(B) JUDICIAL REVIEW.—Any party to the proceeding dissatisfied with the determination of the commission may appeal therefrom, as provided by law, and for this purpose is

hereby authorized to sue the Commonwealth. The commission may, of its own motion, or upon application of any party in interest, submit to the court of common pleas of the county wherein the property affected is located, the determination of the amount of damages to any property owner due to such condemnation, for which purpose such court shall appoint viewers, from whose award of damages an appeal to said court shall lie on the part of any person or party aggrieved thereby, under the general law applicable to the appointment of viewers, for the ascertainment of damages due to the condemnation of private property for public use.

(C) PAYMENT OF COMPENSATION.—The amount of damages or compensation determined and awarded to be paid the owners of adjacent property by the Commonwealth shall, in each instance, be paid by the State Treasurer, on a warrant drawn by the State Treasurer, upon the presentation to that officer of a statement setting forth the amount determined to be paid as aforesaid, duly certified by the commission; such payment to be paid out of any funds specifically appropriated for the improvement of the roads or highways of this Commonwealth; and in case of a verdict and judgment thereon for the damages or compensation, recorded by any such adjacent property owners upon appeal, the same shall be paid out of any funds appropriated as aforesaid; and any court of common pleas hearing and determining such appeal is hereby authorized and empowered to issue a writ of mandamus to such commission and the State Treasurer, or either of them, as the case may require, for the payment of such judgment.

(D) RECOVERY OF COMPENSATION.—The commission shall have the right to recover, for and on behalf of the Commonwealth, by due process of law, as debts of like amount are now by law recoverable, from the public utility or municipal corporation concerned, in such amounts or proportions against each as may be determined by the

commission, as hereinbefore provided in this section, the amount of the damages or compensation awarded to the owners of adjacent property by the commission, or by the court, and the amounts so received shall be paid into the State Treasury, through the Department of Revenue, to the credit of the Motor License Fund.

MOTION FILED

FEB 7 2002

(2)

No. 01-972

IN THE

Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

v.

CITY OF CHESTER, COUNTY OF DELAWARE, and NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL RAILROAD PASSENGER CORPORATION IN SUPPORT OF RESPONDENTS

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February 2002

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL RAILROAD PASSENGER CORPORATION IN SUPPORT OF RESPONDENTS

The National Railroad Passenger Corporation ("Amtrak") respectfully moves pursuant to this Court's Rule 37(b) for leave to file its brief *amicus curiae* in opposition to the petition for writ of certiorari filed by the Pennsylvania Public Utility Commission ("PUC"). Petitioner PUC and Respondents City of Chester and the County of Delaware consent to Amtrak's filing of this brief. Respondents Norfolk Southern Railway Company [1] and the Pennsylvania Depart-

[1] As of June 1, 1999, Norfolk Southern Railway Company succeeded to Consolidated Rail Corporation's ("Conrail") operating rights on the rail line that passes beneath the public highway bridge that is at issue in this case.

ment of Transportation have refused to consent.[2] Original written statements of consent have been filed with the Clerk of this Court.

Amtrak's accompanying brief urges this Court to deny the PUC's petition for a writ of certiorari. In the underlying action, the Pennsylvania Commonwealth Court issued an order instructing the PUC to consider assessing Amtrak for the costs of maintaining a public highway bridge (the Lloyd Street Bridge) in violation of the Rail Passenger Service Act, 49 U.S.C. § 24301(*l*)(1), which exempts Amtrak from such costs. The Commonwealth Court's decision contradicts the holdings of *all* federal circuit and district courts which have addressed the issue. The PUC nonetheless ordered Amtrak to pay a portion of the costs for the Lloyd Street Bridge. The PUC's order directly benefits the named Respondents, who otherwise would be required to pay the portion of the costs assessed to Amtrak.

The issue raised by this petition should be resolved in ongoing proceedings initiated by Amtrak before the Eastern District of Pennsylvania pursuant to 49 U.S.C. § 24301(*l*)(2). In response to the PUC's order, Amtrak sought declaratory and injunctive relief pursuant to 49 U.S.C. § 24301(*l*)(2) before the U.S. District Court for the Eastern District of Pennsylvania. The very issues raised in the PUC's petition have been fully briefed and argued in Amtrak's action in the district court.

In this Court, the PUC names as "Respondents" other parties to the Commonwealth Court decision whose position on the underlying issue of Amtrak's exemption is precisely the same as the PUC's. That is, both Petitioner PUC and Respondents seek a ruling that will hold Amtrak liable for a

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[2] Although Amtrak's brief is submitted nominally in support of Respondents, Amtrak and Respondents hold opposing views on the merits of this case, as will be made clear in the brief that follows.

portion of the cost of maintaining the Lloyd Street Bridge. This Court customarily refuses to entertain suits "which disclose[] a want of a truly adversary contest, of a collision of actively asserted and differing claims," as such suits present no Article III case or controversy. *See Poe v. Ullman*, 367 U.S. 497, 505 (1961); *see also Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). As the federally-subsidized corporation whose federal exemption is at issue, Amtrak is uniquely situated both to provide the missing adversarial viewpoint so critical to this Court's deliberations and to aid this Court's consideration of the important federal interests at stake.

Accordingly, Amtrak respectfully requests leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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Corporation

February 2002

QUESTION PRESENTED

Whether Amtrak's federal exemption (49 U.S.C. § 24301(*l*)(1)) from any "tax, fee, head charge, or other charge, imposed or levied by a State" prevents the Pennsylvania Public Utility Commission from assessing Amtrak for the repair and maintenance of public highway bridges where the Third Circuit and other federal courts have held unanimously that Amtrak is exempt from such costs?

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IN THE

Supreme Court of the United States

No. 01-972

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

v.

CITY OF CHESTER, COUNTY OF DELAWARE, and
NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF *AMICUS CURIAE* OF THE NATIONAL RAILROAD PASSENGER CORPORATION IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37(2) of the Rules of the Supreme Court of the United States, the National Railroad Passenger Corporation ("Amtrak") [1] respectfully opposes the issuance of a writ of certiorari requested by Petitioner Pennsylvania Public Utility Commission ("PUC") to review an order of the Pennsylvania Supreme Court issued on October 5, 2001.

[1] This brief was authored by counsel for Amtrak. No persons or entities other than Amtrak made any monetary contribution to its preparation or submission.

INTEREST OF *AMICUS CURIAE*

Amtrak is a federally-subsidized corporation that was established by Congress to operate passenger train service throughout the United States. Under 49 U.S.C. § 24301(*l*)(1), Amtrak is exempt from all state and local "taxes, fees, head charges, or other charges." Although Amtrak was not a party to the proceedings before the Commonwealth Court of Pennsylvania whose order is at issue in this petition,[2] the burden of the order falls squarely on Amtrak. The Commonwealth Court remanded issues regarding the Lloyd Street Bridge in the City of Chester, Delaware County, Pennsylvania, to the PUC and directed the PUC to consider imposing public highway bridge maintenance responsibilities on Amtrak. The Commonwealth Court found that Amtrak's exemption from state and local taxes, fees, head charges, or other charges pursuant to 49 U.S.C. § 24301(*l*)(1) does not extend to special assessments for Pennsylvania public highway bridge repair and maintenance.

OPINIONS BELOW

The order of the Pennsylvania Supreme Court denying the PUC's Petition for Allowance of Appeal from an opinion of the Commonwealth Court of Pennsylvania (Pet. App. 1a) is unreported.

The opinion of the Commonwealth Court of Pennsylvania (Pet. App. 2a) is reported at 773 A.2d 1280 (Pa. Commw. Ct. 2001).

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[2] The PUC erroneously requests a writ of certiorari directed to the Supreme Court of Pennsylvania. The petition should have requested a writ directed to the highest court that ruled on the merits below, which in this case is the Commonwealth Court of Pennsylvania. *See, e.g., Faretta v. California*, 422 U.S. 806, 812 (1975).

JURISDICTION

The disputed order of the Commonwealth Court of Pennsylvania was entered on April 27, 2001. On October 5, 2001, the Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal thereof filed by the PUC. Pet. App. la. The petitioner asserts that jurisdiction exists in this Court under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The petitioner requests that this Court review an order by the Commonwealth Court of Pennsylvania which vacated a PUC bridge maintenance cost allocation order regarding the Lloyd Street Bridge located in the City of Chester, Delaware County, and which remanded the case with instructions that the PUC consider imposing such costs upon Amtrak. The Commonwealth Court based its order upon a determination, contrary to decisions issued by that same court and *all* federal circuit and district courts that have addressed this issue, that Amtrak's exemption from state and local taxes, fees, head charges, or other charges pursuant to 49 U.S.C. § 24301(*l*)(1) does not extend to special assessments for Pennsylvania highway bridge construction, repair, and maintenance costs.

This Court should not address this anomalous decision by an intermediate state court for several reasons. First, this Court does not possess Article III jurisdiction over this issue, because no case or controversy is presented when, as here, the interests of the Petitioner and all Respondents are aligned in support of a proposed outcome which disfavors non-parties. Second, the federal court decisions on this issue of federal law are unanimous, and the Pennsylvania Commonwealth Court decision merely represents a misapplication of a properly stated rule of law. Third, Petitioner PUC, Respondent Norfolk Southern Railway Company ("Norfolk Southern"), and *amicus* Amtrak already have briefed and argued the issues presented herein before the United States

District Court for the Eastern District of Pennsylvania in proceedings which Amtrak initiated under 49 U.S.C. § 24301(*l*)(2). Amtrak therefore respectfully requests that the instant petition be denied.

Finally, the PUC seeks here the same relief that it sought unsuccessfully from this Court in 1996. Then, as now, the PUC petitioned this Court for a writ of certiorari from another decision of the very same state court in a case in which the Commonwealth Court had ordered the PUC to consider assessing public highway bridge maintenance costs against Amtrak. *See City of Philadelphia v. Pennsylvania Pub. Util. Comm'n*, 676 A.2d 1298 (Pa. Commw. Ct.), *allocatur denied*, 682 A.2d 558 (1996), *cert. denied*, 520 U.S. 1155 (1997). The *City of Philadelphia* case presented the same legal issues as does this case and was before this Court in the same procedural posture. Amtrak opposed the PUC's petition on identical grounds, and this Court denied certiorari. *See* 520 U.S. 1155 (1997). The same result should follow here.

A. Background

1. *Amtrak is Exempt From State and Local Taxes and Fees.*

Amtrak was established in 1971 as a "for-profit" corporation to provide intercity passenger train service throughout the United States in the wake of bankruptcies declared by the major passenger rail providers in the 1970's. 45 U.S.C. § 541. In an effort to reduce Amtrak's subsequent reliance on federal subsidies, in 1979, Congress directed the Secretary of Transportation to study ways to reduce federal outlays to Amtrak, including a possible reduction in Amtrak's state and local tax liability. In his 1980 report to Congress, the Secretary estimated that these taxes would cost Amtrak more than $14 million in the upcoming year alone. S. REP. NO. 253, 97th Cong., 1st Sess. 103 (1981).

The Secretary concluded, and Congress agreed, that "state and local taxes on a primarily Federal investment are inappropriate." *Id.* As a result, Congress passed temporary legislation to exempt Amtrak from all state or local taxes for a one-year period. *Department of Transportation And Related Agencies Appropriation Act*, 1982 Pub. L. No. 97-102, 1981 U.S.C.C.A.N. (95 Stat.) 1442, 1451. The Senate Appropriation Committee Report explained the reasoning for the exemption as follows:

> [S]uch taxation serves to erode the revenue-to-cost ratios which impact on whether States and localities continue to receive the benefit of Amtrak services. The Committee believes it is unreasonable for Federal funds to be granted to Amtrak to provide a tax windfall to States and localities, and consequently the bill prohibits Amtrak from using any appropriated funds or assets for the payment of any State and local taxes.

S. REP. NO. 253, 97th Cong., 1st Sess. 103 (1981).

On September 10, 1982, pursuant to Public Law 97-257, 96 Stat. 852, Congress made permanent Amtrak's tax exemption from state and local taxes and fees:

> Notwithstanding any other provision of law, the National Railroad Passenger Corporation . . . shall be exempt from any taxes or other fees imposed by any State, political subdivision of a State, or local taxing authority which are levied on [Amtrak] . . . from and after October 1, 1981 . . . .

45 U.S.C. § 546b.[3]

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[3] As part of an overall recodification of the United States Code, Section 546b was repealed by Pub. L. No. 103-272, 108 Stat. 1379, 1393, and reenacted with linguistic, but not substantive changes. *See* H.R. REP. NO. 180, 103 Cong., 1st Sess. 1, 3, 5 (1993). It was recodified at 49 U.S.C. § 24301(*l*)(1), which provides that "Amtrak . . . [is] exempt from a tax, fee . . . or other charge, imposed or levied by a State, political

In the legislative history of this second enactment, Congress reiterated its judgment that the states which benefit from Amtrak services should be required to contribute to the continuation of Amtrak's operations through tax relief. S. REP. NO. 516, 97th Cong., 2d Sess. 170 (1982). This legislative history documents Congress' clear intention that Amtrak's immunity from state and local taxation be as broad as the federal government's immunity from such taxes. *See* H.R. REP. NO. 81, 97th Cong., 1st Sess. 21 (1981) (The Committee bill "exempts Amtrak from the payment of all state and local taxes, . . . *to the same extent the United States is exempt* from the payment of such taxes and other fees.") (emphasis added). Thus, like the United States, Amtrak is exempt from all state and local taxes and other fees. *See National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n*, 665 F. Supp. 402 (E.D. Pa. 1987), *aff'd*, 848 F.2d 436, 440 (3d Cir.) ("*Amtrak I*"), *cert. denied*, 488 U.S. 893 (1988); *Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, 826 F. Supp. 1506 (E.D. Pa. 1993) ("*SEPTA*"), *aff'd*, 27 F.3d 558 (3d Cir.), *cert. denied*, 513 U.S. 928 (1994).

2. *Amtrak's Federal Exemption Has Been Upheld Unanimously by the Federal Courts.*

Congress also expressly provided a mechanism for Amtrak to enforce this tax exemption through civil actions brought in the federal district courts. In the event that a state or locality

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subdivision, or local taxing authority . . . after September 30, 1981." The section was amended again by the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570, 2584 (1997), and now exempts Amtrak from any "tax, fee, head charge, or other charge, imposed or levied by a State, a political subdivision or local taxing authority[.]" Pub. L. No. 105-134, § 208, 111 Stat. at 2584.

attempts to impose a tax or fee on Amtrak in violation of Section 24301(*l*)(1), Amtrak can look to the federal district courts for protection:

> [T]he district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak.[4]

49 U.S.C. § 24301(*l*)(2); *see, e.g., Department of Revenue and Taxation of Wyo. v. National R.R. Passenger Corp.*, 1982 WL 1584 (D. Wyo. Dec. 15, 1982) (holding that Amtrak's tax exemption is a valid exercise of Congress' power and prohibiting state from recovering taxes from Amtrak); *National R.R. Passenger Corp. v. New Castle Cty*, 633 F. Supp. 354 (D. Del. 1986) (upholding constitutionality of Amtrak's exemption and ordering refund of taxes paid by Amtrak after effective date).

Thirteen years ago, Amtrak sought protection from costs imposed by Petitioner PUC, when the PUC ordered Amtrak to pay a portion of the replacement costs for a public highway bridge carrying a city street over tracks owned by Amtrak. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n*, 665 F. Supp. 402 (E.D. Pa. 1987). When Amtrak brought an action for declaratory and injunctive relief in the Eastern District of Pennsylvania, the district court carefully reviewed the Congressional intent underlying Amtrak's exemption and concluded:

> The extensive federal involvement [in] Amtrak's management, finances and operations make it apparent that the legislative exemption should be liberally construed

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[4] 45 U.S.C. § 546b, the predecessor to 49 U.S.C. 24301(*l*)(2), granted original jurisdiction to the federal courts "notwithstanding the provision of § 1341 of title 28," the anti-tax injunction act. In the recodification of this provision, this language was omitted as "surplus." H.R. REP. NO. 180, 103d Cong., 1st Sess. 123 (1993).

> to effectuate its goals. Section 546b is no mere exemption of an essentially private entity in exchange for some other benefit to the federal government. Rather, it is an attempt to guarantee Amtrak's fiscal integrity, and indeed its survival. The federal government has pursued governmental functions and policies through Amtrak. It would be inappropriate to undermine those goals through the too stingy construction of the exemption offered by the defendants.

Id. at 411. The court therefore issued both a declaratory judgment that Section 24301(*l*)(1) precluded PUC assessments for the construction or maintenance of highway bridges, and a permanent injunction against future allocations of such costs for the bridge at issue.

The PUC appealed to the U.S. Court of Appeals for the Third Circuit, which affirmed, finding that "[t]he statute's text, its legislative history, and analogous caselaw persuade us to give the exemption . . . a broad interpretation that fulfills the intent of Congress." *Amtrak I*, 848 F.2d at 440. The Third Circuit also held that "Amtrak's immunity from local 'taxes or other fees' . . . extends to assessments for local improvements of the kind at issue here." *Id.* The PUC's subsequent petition to this Court for a writ of certiorari was denied. *Pennsylvania Pub. Util. Comm'n v. National R.R. Passenger Corp.*, 488 U.S. 893 (1988).

Every federal court that has considered the scope of Amtrak's Section 24301(*l*) exemption has affirmed the Third Circuit's holding in *Amtrak I*.[5] For example, in 1991, the

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[5] *See Wheeling & L.E.R.R. v. Pennsylvania Pub. Util. Comm'n*, 141 F.3d 88, 95-96 (3d Cir. 1998) (declining PUC's request to overrule *Amtrak I* and *SEPTA*), *cert. denied* 523 U.S. 928 (1999); *National R.R. Passenger Corp. v. Pennsylvania*, 1991 WL 998 (E.D. Pa. Jan. 2, 1991); *Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, 802 F. Supp. 1273 (E.D. Pa. 1992); *SEPTA*, 826 F. Supp. 1506 (E.D. Pa. 1993).

PUC ordered Amtrak to repair and maintain (as opposed to replacing) the same highway bridge at issue in *Amtrak I*. In the resulting Section 24301(*l*)(2) proceeding, the district court again analyzed Section 24301(*l*) and determined that such orders constituted unlawful state and local taxes and fees. *National R.R. Passenger Corp. v. Pennsylvania*, 1991 WL 998 (E.D. Pa. Jan. 2, 1991) ("*Amtrak II*").

The same result obtained two years later when the PUC attempted to impose highway bridge assessments on the Southeastern Pennsylvania Transportation Authority ("SEPTA"), the Philadelphia commuter rail operator to which Congress extended the *same* federal exemption from state and local taxes and fees that Amtrak enjoys. 49 U.S.C. § 24301(f) (2001) (formerly 45 U.S.C. § 581(c)(5)) [6]; *SEPTA*, 826 F. Supp. 1506. When the PUC and the Commonwealth Court of Pennsylvania assessed SEPTA for the maintenance of four public highway bridges that pass over tracks owned by SEPTA, the Eastern District granted SEPTA a permanent injunction against PUC assessments for their construction, design, maintenance, inspection or repair. *SEPTA*, 826 F. Supp. at 1511. On appeal, the Third Circuit *again* affirmed that such assessments constituted a prohibited "tax or fee", and this Court denied the PUC's resulting petition for a writ of certiorari.[7]

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[6] 45 U.S.C. § 581(c)(5) stated that local commuter authorities "shall be exempt from the payment of any taxes or other fees to the same extent [Amtrak] is exempt." 45 U.S.C. § 581 was repealed by Pub. L. 103-272, 37(b), 108 Stat. 1379, on July 5, 1994, and reenacted and recodified in 49 U.S.C. § 24501(g). This provision was subsequently moved and now appears at 49 U.S.C. § 24301(f), which provides that "[a] commuter authority . . . is exempt, effective October 1, 1981, from paying a tax or fee to the same extent Amtrak is exempt."

[7] Subsequently, on January 19, 1996, the Eastern District of Pennsylvania approved a Consent Decree between SEPTA and the PUC in which the PUC agreed that "[u]nder 49 U.S.C. § 24301(*l*) and

Among the 46 states in which Amtrak operates, the Commonwealth of Pennsylvania alone continues to assess Amtrak for local public improvements. Other states have accepted and followed the consistent and unanimous reasoning of the Third Circuit and the district courts in holding that § 24301(*l*)(1) prohibits states and localities from assessing local improvements against Amtrak.[8]

B. The Decisions Below

The underlying dispute arose from the PUC's issuance of an order dated September 1, 2000, requiring parties other than Amtrak to share the costs of repairing and maintaining a three-span bridge which carries Lloyd Street in the City of Chester over a below-grade railroad right-of-way owned by Amtrak ("the Lloyd Street Bridge"). The bridge was constructed in 1899 by the Pennsylvania, Washington and Baltimore Railroad Company, and Amtrak acquired the right-

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24501(*g*), the Commission is barred hereafter from assessing or continuing to assess upon SEPTA the cost or responsibility for design, construction . . . or repair of any Highway Bridge . . . ." *See Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, Civil Action No. 95-CV-4500 (E.D. Pa. Jan. 19, 1996). Pet. App. 60a..

[8] The Second Circuit's decision in *National R.R. Passenger Corp. v. City of New York*, 882 F.2d 710 (2d Cir. 1989) is not to the contrary. The *City of New York* case addressed consensual agreements under which Amtrak paid the City of New York regularly renegotiated rents for the right to operate through subterranean, city-owned rights of way. The Second Circuit contrasted those with the assessments addressed in *Amtrak I*, and expressly distinguished *Amtrak I* noting that "the circumstances presented to us *so clearly concern an area not within the parameters of section [24301(l)]* that is unnecessary to consider the tax immunity rules considered by the Third Circuit." *Id.* at 716 n.2 (emphasis added). Judge Newcomer of the Eastern District of Pennsylvania also has considered and distinguished *City of New York* from the situation presented by PUC bridge cost assessments. *Amtrak II*, 1991 WL 998, at *4 n.4; *accord Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, 802 F. Supp. 1273, 1280 (E.D. Pa. 1992).

of-way running below the bridge through the congressionally-mandated conveyance process established by the Regional Rail Reorganization Act of 1973. *See* 45 U.S.C. §§ 701 *et. seq.* Amtrak does not, however, own the bridge. *City of Philadelphia v. Consolidated Rail Corp.*, 747 A.2d 352, 354-55 (Pa. 2000) (Amtrak does not own public highway bridges crossing its right-of-way).

Following a PUC investigation, hearings were held before PUC Administrative Judge Herbert Smolen who determined that the City of Chester should provide 75% of the bridge's maintenance and repair costs, and that Conrail, the County of Delaware and the Pennsylvania Dept. of Transportation should provide the remaining 25%. Pet. App. 7a. Judge Smolen's Recommended Decision also held that Section 24301(*l*)(1) exempted Amtrak from the assessment of such costs based upon the Third Circuit's decision in *Amtrak I.*[9] This Recommended Decision was adopted by the PUC, and subsequently appealed to the Pennsylvania Commonwealth Court by the City of Chester, the County of Delaware, and Conrail on the grounds that Amtrak was not exempted from such assessments pursuant to the Commonwealth Court's 1996 decision in *City of Philadelphia v. Pennsylvania Pub.*

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[9] Administrative Judge Smolen did discuss various Pennsylvania state cases which held that the PUC could allocate costs to Amtrak, but concluded that the PUC should adhere to the Third Circuit's holding in *Amtrak I. See City of Philadelphia v. Pennsylvania Pub. Util. Comm'n*, 676 A.2d 1298 (Pa. Commw. Ct. 1995), *allocatur denied*, 682 A.2d 558 (Pa. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Parkesburg Borough v. Pennsylvania Pub. Util. Comm'n*, 681 A.2d 872 (Pa. Commw. Ct. 1996); *City of Philadelphia v. Consolidated Rail Corp.*, Nos. 96-RR-01 and 96-RR-03 (Sp. Ct. R.R.R.A. Nov. 3, 1997), *rev'd City of Philadelphia v. Consolidated Rail Corp.*, 222 F.3d 990 (D.C. Cir. 2000).

Util. Comm'n, 676 A.2d 1298 (Pa. Commw. Ct.), *allocatur denied*, 682 A.2d 558 (Pa. 1996), *cert. denied*, 520 U.S. 1155 (1997).[10]

In the case below, the Commonwealth Court began its Section 24301(*l*) analysis with a detailed discussion of the *City of Philadelphia* decision. *City of Chester v. Pennsylvania Pub. Util. Comm'n*, 773 A.2d 1280, 1285-86 (Pa. Commw. Ct. 2001). Judge Pellegrini, the author of both the opinion below and the *City of Philadelphia* opinion, reiterated his earlier conclusion that bridge repair and maintenance costs were not "taxes." No mention was made of the Commonwealth Court's duty to accord the Third Circuit's judgment in *Amtrak I* full faith and credit as a prior federal judgment on the same issue between the same parties. Furthermore, the Commonwealth Court stated that "because the PUC is constrained to follow *City of Philadelphia*," the court vacated the PUC order and remanded the case to the PUC with instructions to allocate costs among existing parties as well as Amtrak and SEPTA. *Id.* at 11a.

Upon remand, a new Recommended Decision was issued on August 7, 2001, in which maintenance costs, as well as responsibility for providing flagmen, watchmen, and various materials for the Lloyd Street Bridge, were allocated to Amtrak. Pet. App. 15a, 35a-37a. That Recommended

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[10] In *City of Philadelphia*, a case decided eight years after *Amtrak I* and three years after *SEPTA*, the Commonwealth Court chose to revisit, *sua sponte*, the scope of Amtrak's § 24301(*l*)(1) exemption. Notwithstanding the clear and unanimous federal precedent on the issue, the Commonwealth Court held that an assessment for repairing and maintaining the public highway bridge at issue in that case was not a "tax or fee" from Amtrak should be exempt. 676 A.2d at 1309. The PUC's subsequent petitions for review of that decision were denied by both the Pennsylvania Supreme Court and this Court. *City of Philadelphia v. Pennsylvania Pub. Util. Comm'n*, 682 A.2d 558 (Pa. 1996) (denying allocatur), *cert. denied*, 520 U.S. 1155 (1997).

Decision was adopted in a final PUC order on September 7, 2001. Appeals from that order remain pending before the Commonwealth Court.

Amtrak did not appeal the PUC's order to the Commonwealth Court and is not a party to the proceedings in that court. Rather, Amtrak filed an action pursuant to 49 U.S.C. § 24301(*l*)(2) in the Eastern District of Pennsylvania to enforce its tax exemption and to compel the PUC's adherence to the Third Circuit's judgment in *Amtrak I. National Passenger R.R. Corp. v. Pennsylvania Pub. Util. Comm.*, Civil Action No. 01-CV-5570 (E.D. Pa.). In that case, Amtrak is seeking both a declaratory judgment to reaffirm its already well-established exemption from public highway bridge construction, maintenance, and repair costs, a permanent injunction against further cost assessments by the PUC relating to the Lloyd Street Bridge, and an injunction against the other parties to the Commonwealth Court proceedings to prevent them from seeking enforcement of the PUC's order.

The merits of Amtrak's and the PUC's positions have been fully briefed in the District Court and were argued before the Honorable Jan E. DuBois on January 11, 2002.[11] Thus, the issues that are the subject of the PUC's petition to this Court are currently before the proper, Congressionally designated forum, the Eastern District of Pennsylvania, pursuant to 49 U.S.C. § 24301(*l*)(2). Notwithstanding the pending federal actions, the PUC first submitted a petition for review of the Commonwealth Court's Decision to the Pennsylvania

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[11] SEPTA concurrently filed a Petition in the Eastern District to enforce its 1996 Consent Decree barring the PUC from imposing Bridge maintenance and repair costs pursuant to its parallel exemption at 49 U.S.C. § 24301(f). *Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, C.A. No. 95-4500 (E.D. Pa.). SEPTA's Motion to enforce the consent decree also has been fully briefed and also was argued before Judge DuBois on January 11, 2002.

Supreme Court which was denied without any published opinion on October 5, 2001,[12] and then filed a Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE PETITION

I. IN ITS CURRENT POSTURE, THIS MATTER DOES NOT PRESENT A "CASE OR CONTROVERSY" RIPE FOR REVIEW BY THIS COURT.

A. There Is No Genuine Adversity Between The Parties Before This Court.

Article III of the Constitution limits the judicial power of the federal courts to "cases or controversies." *Clinton v. City of New York*, 524 U.S. 417, 429 (1998); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990); U.S. CONST. art. III, § 1. "The basic inquiry is whether the 'conflicting contentions of the parties . . . present a real, substantial controversy between parties having *adverse legal interests*, a dispute definite and concrete, not hypothetical or abstract.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Collusive suits brought by parties with a common interest in obtaining a decision adverse to a third party, as well as the Article III prohibition against issuing advisory opinions, are particular concerns where no *bona fide* conflict exists between at least two genuinely adverse parties. *Poe v. Ullman*, 367 U.S. 497, 505 (1961); *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (Article III "limit[s] the business of federal courts to questions presented in an adversary context"); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). As this Court also held in *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, the presence of adverse parties "sharpens the presentation of issues upon which the court so largely depends for illumination of

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[12] In the thirteen years of litigation on this issue between Pennsylvania and federally exempt transportation entities, the Supreme Court of Pennsylvania has never issued a decision addressing this issue.

difficult . . . questions." 445 U.S. 375, 382-83 (1980), quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) and *Baker v. Carr*, 369 U.S. 186, 204 (1962). *See also Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). Thus, this Court has refused to entertain cases "which disclosed a want of a truly adversary contest, of a collision of actively asserted and differing claims." *Poe*, 367 U.S. at 505.

These principles have been applied in several analogous cases. In *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971), where both Petitioner and Respondent requested that this Court hold that North Carolina's anti-busing statute was constitutional, this Court dismissed the appeal for lack of a case or controversy within the meaning of Article III. Similarly, in *United States v. Johnson*, 319 U.S. 302, 305 (1943), a tenant brought a "friendly suit" against a landlord under a federal rent control statute. The landlord challenged the constitutionality of the statute and the United States intervened. On appeal, notwithstanding the intervention of the United States, this Court ordered the case dismissed, holding that "[s]uch a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process . . . ." *Id.* (citations omitted). *See also South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892) (no real controversy where control of both parties had come into the hands of the same persons).

The PUC's petition presents a textbook example of a collusive suit by parties desiring a judgment prejudicial to a non-party. From the earliest stages of the PUC proceeding, each Respondent's primary interest has been the minimization of its allocated costs and responsibility for public highway bridge maintenance. Respondents appealed to the Commonwealth Court claiming that Amtrak should bear a portion of the cost of maintaining the Lloyd Street

Bridge. Pet. App. at 9a. If the PUC were to prevail on the issue it presents to this Court, the Respondents would benefit by having Amtrak share the costs of maintaining public highway bridges that cross Amtrak's rights-of-way. The PUC, in turn, already has reassigned highway bridge maintenance costs from Respondents to Amtrak in reliance on the disputed Commonwealth Court decision, in spite of Amtrak's statutory exemption. Pet. at 7.

It is clear from an examination of the PUC's petition that the PUC and the Respondents lack the necessary adversity to invoke the jurisdiction of this Court. The PUC's position is completely aligned with the position of the Respondents, and indeed, with the very decision from which it appeals. In its petition, the PUC essentially urges this Court to affirm a Pennsylvania Commonwealth Court order remanding the Lloyd Street Bridge matter to the PUC with instructions to assign public highway bridge maintenance costs to Amtrak, in spite of Amtrak's exemption from state and local taxes, fees, head charges, or other charges.

In essence, the PUC's petition merely seeks an advisory opinion regarding whether the Commonwealth Court properly rejected long-standing federal court precedent and other Commonwealth Court decisions governing the scope of Amtrak's federal exemption. Article III does not permit this Court "to give advisory opinions about issues as to which there are not adverse parties before us." *Princeton University v. Schmid*, 455 U.S. 100, 102 (1982). Because the PUC and Respondents all seek "precisely the same result," i.e., additional parties against which to assess highway bridge maintenance and repair costs (*see Moore*, 402 U.S. at 48), this Court lacks jurisdiction to grant the PUC's petition.

B. This Issue Should Be Fully Adjudicated In The Lower Federal Courts Before Certiorari Is Granted

Congress specified the federal district courts as the proper forum in which to enforce Amtrak's exemption:

> The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak.

See 49 U.S.C. § 24301(*l*)(2). Moreover, under Article III, it would be inappropriate for the Court prematurely to take jurisdiction over this case. *See generally Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

As this Court stated in *Abbott Laboratories v. Gardner* regarding Article III ripeness, "the problem is . . . best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* Such an evaluation of this matter reveals that it is not ripe, both because the issue presented by the PUC clearly is not fit for review by this Court at this time, and because the PUC will not suffer any hardship if certiorari is denied.

The parties and Amtrak already are before the proper federal forum (short of this Court) to resolve the issues presented by the Commonwealth Court's remand order. As authorized by § 24301(*l*)(2), Amtrak initiated proceedings in the U.S. District Court for the Eastern District of Pennsylvania seeking an appropriate declaratory judgment and injunction. In that action, genuinely adverse parties are developing a full factual and legal record through extensive briefing and oral argument.[13] The district court proceedings

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[13] For example, the district court will address a question ignored by the Commonwealth Court—the obligation of the Pennsylvania state courts to

will serve the important role of focusing the issues to be resolved, after which the Third Circuit will have an opportunity to review all of the factual and legal developments that have occurred since its decision in *Amtrak I* thirteen years ago. Even more important, the lower federal courts will have the opportunity to reconsider the views of the Commonwealth Court and refine their own legal analyses.

Section 24301(*l*)(2) authorizes the district court to enforce Amtrak's exemption through appropriate declaratory and equitable relief. Indeed, the PUC itself should have sought a declaratory judgment in the federal district court regarding the scope of Amtrak's exemption from state and local taxes and fees.[14] Section 24301(*l*)(2) instructs the district courts to grant equitable or declaratory judgments, and the All Writs Act expressly authorizes the district court to "issue all writs necessary or appropriate in aid of their respective jurisdictions," including all auxiliary writs not specifically prohibited by Congress. 28 U.S.C. § 1651; *United States v. New York Tel. Co.*, 434 U.S. 159, 172-173 (1977), quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 273 (1942).

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accord full faith and credit to the prior opinions of the Third Circuit in *Amtrak I* and *SEPTA*. It is black letter law that state courts must accord full faith and credit to the judgments of federal courts, particularly on issues of federal law. *See, e.g., Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001) (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938)).

[14] *See United States v. Allegheny County*, 322 U.S. 174 (1943), overruled *sub silentio* on other grounds, *United States v. City of Detroit*, 355 U.S. 466, 469 (1957) (scope of intergovernmental tax immunity is governed by federal law, because "where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures."). Even the Commonwealth Court envisioned that the lower federal courts would review its decision in the first instance, as it characterized its previous opinion as "an effort to convince the Third Circuit that [the Commonwealth Court's characterization was] the better view." *City of Philadelphia*, 676 A.2d at 1305.

Amtrak and SEPTA's actions in the district court seek injunctive relief to compel all participants in the Commonwealth Court proceedings to respect the prior judgments of the Third Circuit in *Amtrak I* and *SEPTA*. The injunctive order sought by Amtrak in the district court would resolve the dilemma the PUC claims to face. Thus, there can be no doubt that exercise of certiorari jurisdiction would be premature and frustrate the development of a proper appellate record.

II. THE PUC WILL SUFFER NO HARDSHIP FROM DENIAL OF REVIEW BY THIS COURT.

In addition, the PUC will not suffer any hardship if this Court denies its petition and allows the proceedings now pending in the district court to take their course. For the past thirteen years, the PUC has been barred from apportioning public highway bridge costs to Amtrak pursuant to *Amtrak I*. By its own admission, the PUC "has been operating under the strictures imposed by the federal courts since 1988, when [*Amtrak I*] was decided." Pet. at 4. Neither § 24301(*l*)(1) nor the Third Circuit's decision in *Amtrak I* prohibit the PUC from entering all orders necessary to eliminate any condition at a public rail-highway crossing that threatens public safety. Nor is the PUC prohibited from ordering all necessary actions by parties other than entities entitled to federal immunity (such as the United States, Amtrak, and SEPTA) to ensure that public highway bridges are maintained in safe condition. In short, the PUC's "ability to issue and enforce its orders" (Pet. at 11) is not "restricted" by Amtrak's exemption or the federal decisions enforcing it. The exemption affects only the PUC's cost allocation function, not its safety responsibilities.

Thus, the claimed hardship to the PUC created by the "direct and irreconcilable conflict" between federal court precedent and the latest decision of the Commonwealth Court is insubstantial. Any claimed hardship is properly addressed in the pending district court action. Only after the Eastern

District and the Third Circuit have reviewed this issue should this Court consider whether certiorari is appropriate. Accordingly, this Court should deny the PUC's petition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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